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(1) PROCEEDINGS  
(2) 10:00 a.m.  
(3) JUDGE SIPPEL: We're here this morning at my call  
(4) primarily to address the pending motion to enlarge issues  
(5) against Liberty. I first want to, however, talk about two  
(6) preliminary matters. One is with respect to  
(7) confidentiality. I have, of course, signed the consent  
(8) confidentiality order that was presented. And I'm very  
(9) cognizant of it and I don't want to lose sight of it. So I  
(10) want to talk about it right up front.  
(11) This - there are briefs that have been filed,  
(12) particularly the last round that was submitted by Freedom  
(13) and Liberty, that are highlighted - highlighted warning at  
(14) the top with respect to confidentiality. And clearly, there  
(15) are matters in there in some detail that relate to these  
(16) agreements that we've granted confidential status to. I -  
(17) I want to use - whichever way I go on this issue, I want to  
(18) use a considerable amount of that material.  
(19) I think if I add the issue, I'll certainly have to  
(20) address those issues - when I say the issues, I mean I have  
(21) to address the factual information that is being relied upon  
(22) by Liberty if I'm concluding that that information doesn't  
(23) carry the day. I don't want to do it in a short trip  
(24) manner. On the other hand, if I - certainly if I reject  
(25) the issues, the same reason applies. And I don't want to

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(1) have an order that's going to have to be partially in camera  
(2) or partially filed under sealed and partially public. So  
(3) I - I'm asking I guess for some guidance on this from you  
(4) all in terms of how you feel about it.  
(5) Let me tell you where I'm coming out on this. I  
(6) don't see anything even in the agreements that would warrant  
(7) there be given - if push came to shove, I don't see  
(8) anything in the agreements that would warrant them not being  
(9) made public in this case. The reason I say that is because  
(10) these are - they are historical in nature at this point  
(11) really. They just recite what has happened. And although  
(12) there's a lot of detail in them and for purposes of the  
(13) issue of control which we're concerned about here today, of  
(14) course there's very important detail in them.  
(15) But nonetheless, the basic framework of the  
(16) information is on public record already with the 10-Ks of  
(17) the SEC and whatever has come out even in this proceeding.  
(18) So now that same thought would carry over with respect to  
(19) what's going to be discussed today. We're obviously going  
(20) to talk about some of these facts in a very candid matter.  
(21) And I don't see any reason why this transcript can't be put  
(22) onto public record. Now, that's what I intend to do.  
(23) If they want - if anybody wants relief from - so  
(24) where I'm coming out - so you know exactly where I'm coming  
(25) from, first of all, with respect to anything that I write on

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(1) this motion to add the issues, I expect to use all the  
(2) information as fully and completely as I feel is necessary  
(3) to do justice to the issue that I'm writing. And I intend  
(4) to put that on the public record; that is, my final  
(5) memorandum, opinion and order I intend to have put on the  
(6) public record without any changes.  
(7) I don't intend to unnecessarily put the agreements  
(8) on the public record. And I would treat those exactly as we  
(9) have agreed to do under the order, under the ground rules  
(10) that we've been using here unless there's a reason shown as  
(11) to why they have to commit to evidence in a hearing context  
(12) or of an evidentiary reason. That's a whole different  
(13) consideration. I'm just talking about right now on this  
(14) preliminary motion practice that we're engaged in here.  
(15) Secondly, with respect to today's proceeding, I  
(16) don't - I expect the transcript of this proceeding, today's  
(17) proceeding, that is, to be put right on the public record  
(18) without any changes, without any - well, not changes, but  
(19) without any - any isolation of any of the portions for  
(20) purposes of confidentiality. Now, of course, there will be  
(21) a period of time - you get delivery of this transcript in a  
(22) matter of days. And I would certainly give you time to  
(23) address this in a motion or somehow or other bring this to  
(24) my attention. But I want to let you know where I'm coming  
(25) out up front on this.

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(1) So anyway, that's point number one. Now,  
(2) secondly, with respect to discovery update, who can give me  
(3) some information on the discovery update? I guess Mr.  
(4) Spitzer probably -  
(5) MR. SPITZER: Sure. Absolutely, Your Honor. I  
(6) guess there are two issues that merit attention. First,  
(7) there was the question of phone memoranda from Mike  
(8) Lemphuel. And as I think Mr. Lemphuel testified in his  
(9) deposition, there are no such formal memoranda. We have  
(10) gone through the totality of the records once again. There  
(11) simply are not any documents that are memos of Mike Lemphuel  
(12) to the file saying I had a conversation with Joe Smith at  
(13) Liberty with respect to this issue. They simply do not  
(14) exist.  
(15) There are - and again, I say this without waiving  
(16) any privileges - one or two memoranda that Mike Lemphuel  
(17) has to the file that recount conversations that he had with  
(18) folks at Gettysburg. I think there's one, actually. I'm  
(19) not sure if there is another - which again I'm not in the  
(20) position to make irrelevance determination for you, but it's  
(21) simply not pertinent to anything in this litigation. But  
(22) there is one such memorandum, one such memorandum. But it  
(23) has nothing to do with a conversation with anybody at  
(24) Liberty. So that was the first inquiry - the specific  
(25) inquiry that you had made, I believe.

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(1) With respect to a privilege log, we can have that  
(2) done by Monday. We've gone through all the documents; we  
(3) have sorted through them; we are generating a privilege log  
(4) and we will produce it on Monday.  
(5) JUDGE SIPPEL: All right. How extensive is that  
(6) log going to be? Can you anticipate -  
(7) MR. SPITZER: In terms of the number of documents?  
(8) JUDGE SIPPEL: Yes, what are we talking about?  
(9) MR. SPITZER: It's - you know, that's whether I  
(10) have three, four, five inches of documents that we've gone  
(11) through.  
(12) JUDGE SIPPEL: Well, no, your list isn't going to  
(13) be that big.  
(14) MR. SPITZER: No, no. I'm talking about the  
(15) documents that are at issue are about this thick. The list  
(16) I have no idea, simply no idea. It's being generated as we  
(17) speak by some attorneys and paralegals up in New York. I've  
(18) gone through all the documents and - you know.  
(19) JUDGE SIPPEL: That's not an --  
(20) MR. SPITZER: There ain't nothing there as they  
(21) say.  
(22) JUDGE SIPPEL: The size doesn't seem to be an  
(23) over-imposing burden. We'll get to see these out.  
(24) MR. SPITZER: It will be completed by Monday at  
(25) 2:00.

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(1) JUDGE SIPPEL: All right. Then again, as I've  
(2) indicated in my order to go back to that, I really want  
(3) counsel to be working on this - I mean, try and work this  
(4) through as best you can before having to come to me with  
(5) motions. Maybe after seeing the - after they see the  
(6) index, I'm hoping that there's going to be some obvious  
(7) types of documents that are just not going to, you know -  
(8) there's not going to be any fight over.  
(9) MR. SPITZER: Well, Your Honor, I - again, I'm -  
(10) Mr. Beckner and I tend to disagree on some of these matters.  
(11) But with respect to the assertion of privilege, I don't  
(12) think that there is any question about the legitimacy of the  
(13) assertion of privilege here. I mean, this is a law firm and  
(14) these are documents generated by lawyers.  
(15) JUDGE SIPPEL: I understand that. I'm talking -  
(16) I'm saying -  
(17) MR. SPITZER: It's not third party documents.  
(18) JUDGE SIPPEL: No, I understand that. But I'm  
(19) saying that putting that aside, I mean, there's going to be  
(20) certain documents if it's - if it's just simply - and this  
(21) is very important I understand. But I mean, if it's simply  
(22) exchanges of theories between attorneys while working on the  
(23) case, I don't want to spend any time having to get into  
(24) that. It's a question of the documents that were seen or  
(25) used by the people at Liberty who were doing the work.

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- (1) The transactions that we're talking about, that's  
 (2) the kind of document that I'm - that, you know, may be a  
 (3) subject of - I would like to see whether or not there's  
 (4) been any waiver or - I mean I would be willing to look at  
 (5) it to see if there's been any waiver or if Mr. Beckner can  
 (6) come up with some theory as to why the privilege shouldn't  
 (7) apply. I'm not looking for work is what I'm trying to say.  
 (8) I really am not. So if, Mr. Beckner, you see that there's  
 (9) something in there that based on what I'm telling you think  
 (10) I probably wouldn't want to see anyway, let's not, you  
 (11) know - let's not ask for it.  
 (12) MR. BECKNER: Well, no. We certainly wouldn't  
 (13) take up your time with a request for, you know, an internal  
 (14) form memorandum on legal theories and those kind of  
 (15) privileged kinds of documents.  
 (16) JUDGE SIPPEL: Well, I just wanted to express my  
 (17) approach on this. All right. Then this will also cut down  
 (18) on the number of papers that we'll have to deal with. So  
 (19) it's going to make it easier on both sides, or less  
 (20) burdensome I should say. That's all that I have. Today the  
 (21) procedure is going to be that there's a ten minute  
 (22) presentation up front by the three major participants. And  
 (23) then I have a series of questions. And again, I've given  
 (24) you as much advanced notice as I can in terms of what my  
 (25) concerns are.

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- (1) MR. SPITZER: Your Honor -  
 (2) JUDGE SIPPEL: Well, I was just going to say,  
 (3) before I could - that's all I want to say. So if you have  
 (4) a preliminary - some preliminary questions, go ahead.  
 (5) MR. SPITZER: The question, it relates to the  
 (6) first issue that you raised, Your Honor, which is the  
 (7) confidentiality issue. And I suppose I'm a bit concerned  
 (8) about beginning with the presumption that this record of  
 (9) today's conversation or discussion with Your Honor will  
 (10) necessarily end up in the public record because I think the  
 (11) mutual understanding had been that with respect to documents  
 (12) and discussions pertaining to the transaction where there  
 (13) would be reference to information in the transaction  
 (14) documents that had been deemed confidential, any transcripts  
 (15) generated from the discussion would also be deemed  
 (16) confidential and not be subjected to public scrutiny which  
 (17) is why I think Mr. Beckner said he told his client he could  
 (18) not attend today.  
 (19) Now, I know this is an issue we have to discuss.  
 (20) Obviously, you've stated that you have a different  
 (21) perspective on it. But in terms of moving forward today,  
 (22) I'm just wondering if we could somehow agree that this -  
 (23) the transcript of today's discussion will be kept sealed  
 (24) until we have an opportunity to resolve these issues.  
 (25) JUDGE SIPPEL: I think that's what I said. I

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- (1) mean, that's what I tried - I just wanted you to know up  
 (2) front what I feel about it. Yes?  
 (3) MS. KIDDOO: Your Honor, I would like to echo what  
 (4) Mr. Spitzer said. Obviously, the contracts have been made  
 (5) available subject to very strict proprietary treatment and  
 (6) that was the basis upon which we agreed to make them  
 (7) available. It would be, with all due respect to Your  
 (8) Honor's position, certainly my client's view that disclosure  
 (9) of the details of these contracts would be harmful to their  
 (10) position in the marketplace in New York.  
 (11) That having been said, we also agree with Your  
 (12) Honor that you can't resolve this issue without knowing and  
 (13) being able to base your decision upon the structure of the  
 (14) transaction and the relationship between the parties. And  
 (15) we have no objection. In fact, our first opposition was  
 (16) filed on the public record. And it described in some detail  
 (17) the structure of the transaction. And we don't have a  
 (18) problem with that.  
 (19) What we do have a problem with, and I expect Mr.  
 (20) Beckner will cite to very particular provisions in the  
 (21) contract today in this - in this hearing, and I think that  
 (22) that is the concern that we have. To the extent that Your  
 (23) Honor needs to in his decision obviously relate to the  
 (24) structure of the transaction and perhaps cite to paragraphs  
 (25) of the provision which are, in fact, in the Commission's

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- (1) records, that's fine. It would be really quoting of them  
 (2) and describing in detail particular kinds of financial  
 (3) relationships and that sort of thing that raises the  
 (4) concern.  
 (5) So I think that your need to be able to in your  
 (6) order relate to the structure of the transaction is  
 (7) something that doesn't cause us any problems. And I think  
 (8) if to the extent that you can do that in a more general way  
 (9) and cite to particular provisions if you need to, they are  
 (10) on the Commission's - in the Commission's record in a  
 (11) proprietary sealed way I think at this point. And if  
 (12) they're not, we can make them.  
 (13) JUDGE SIPPEL: Well, you mean the - well, the  
 (14) agreements are with the Commission - I believe they -  
 (15) well, I don't know that myself for a fact. They are - the  
 (16) agreements themselves that have been produced and have been  
 (17) given to me are with the secretary's office in a sealed  
 (18) context or -  
 (19) MS. KIDDOO: I don't believe Mr. Baker did that.  
 (20) He filed them with you, Your Honor, and sent copies to Mr.  
 (21) Webber at the Commission and then to counsel for the other  
 (22) parties. I don't believe they were actually filed. We can  
 (23) certainly do that if you think that's important for the  
 (24) Commission's record.  
 (25) JUDGE SIPPEL: Well, I do. And I - but they only

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- (1) need to be filed in the - in the redacted version. I think  
 (2) the redactions are so - to me, I mean, a redaction that was  
 (3) done was so simply done, not simply done, but was done so  
 (4) selectively. And really, we're just talking about a couple  
 (5) of dollar figures that were taken out. I don't see any  
 (6) reason why I need to clutter up the Commission's files with  
 (7) the, you know -  
 (8) MS. KIDDOO: No, I was talking about filing the  
 (9) redacted versions in the record if you think as a procedural  
 (10) matter that's where they need to be for you to be able to  
 (11) rely on them. But I would not propose to file the  
 (12) unredacted versions.  
 (13) JUDGE SIPPEL: Yes, then that - yes. To get back  
 (14) to what you're suggesting, yes, file them with the  
 (15) secretary's office, but as sealed documents, you know, under  
 (16) the normal confidentiality procedures that you'd be filing  
 (17) because there's no question that there's going to be  
 (18) reliance on rulings throughout - from here on out as far as  
 (19) this issue is concerned. And whether it's on the record or  
 (20) off the record or somehow or another, those agreements have  
 (21) to be with the Commission files on this.  
 (22) All right. Well, I just - you know, I don't want  
 (23) to spend a lot of time debating my reasons for it. But I  
 (24) want to let you know how I feel about it. Now, it doesn't  
 (25) mean I'm going to treat them any differently. I mean, I'm

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- (1) going to treat those agreements as I agreed to do it, as I  
 (2) signed an order requiring me to do it. And I'm going to -  
 (3) this transcript will be treated that way, also, until there  
 (4) is a resolution to the contrary.  
 (5) I just have a strong feeling about wanting to put  
 (6) things on the public record unless there's a very good  
 (7) reason as to why they shouldn't be. That's all. All right.  
 (8) MR. KIRKLAND: Your Honor, I'm sorry. My name is -  
 (9) Jim Kirkland. I'm here for Cablevision of New York City.  
 (10) Phase I.  
 (11) JUDGE SIPPEL: Good morning, Mr. Kirkland.  
 (12) MR. KIRKLAND: And one question I was unable to  
 (13) answer on a conference call on Tuesday was whether  
 (14) Cablevision had any of its own pending discovery issues that  
 (15) needed to be resolved. And I've since had the opportunity  
 (16) to consult with Mr. Holt. And the only pending request  
 (17) which we have is for - it came up in the context of the  
 (18) Peter Price deposition where Mr. Holt asked counsel for  
 (19) Liberty to try to locate whether or not one of the exhibits  
 (20) which appeared to refer to attachments, if those attachments  
 (21) existed and if so, to produce them.  
 (22) And also, I believe there was a question raised  
 (23) about whether this was a subsequent version of an earlier  
 (24) document and whether earlier versions existed. And  
 (25) yesterday, I spoke with Mr. Spitzer and he agreed that they

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(1) were going to undertake that search. And assuming that that  
 (2) search was completed and we get some written confirmation as  
 (3) to the results or the production of any documents that are  
 (4) located, we don't have any issues right now that are pending  
 (5) or that require the attention of the Court.  
 (6) JUDGE SIPPEL: Okay.  
 (7) MR. SPITZER: Your Honor, I think I can respond  
 (8) quickly. The -- to put in context, and I don't need to  
 (9) belabor the record, this was a chart that was appended to a  
 (10) letter and the question was since there had not been a  
 (11) staple attached, whether that chart in fact was the appended  
 (12) chart that was referred to in the letter. And by all  
 (13) evidence that we've been able to discern, it is the chart.  
 (14) It is the only version of the chart and there has been a  
 (15) search that has been done. We've requested that it be done  
 (16) again. But there's been no evidence that there is any other  
 (17) version of that chart or that there is any other chart that  
 (18) was appended to that letter.  
 (19) JUDGE SIPPEL: All right.  
 (20) MR. SPITZER: And this is a chart that listed  
 (21) buildings and dates and -- it was the subject of -- it was  
 (22) an exhibit at both Mr. Price's deposition and several of the  
 (23) other depositions, as well.  
 (24) JUDGE SIPPEL: All right. Well, this being  
 (25) pursued then, I'm satisfied. Thank you for bringing it to

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(1) my attention, Mr. Kirkland.  
 (2) MR. KIRKLAND: Thank you, Your Honor.  
 (3) JUDGE SIPPEL: That's all I have then on the  
 (4) preliminaries. Does anybody else have anything preliminary  
 (5) they want to raise? Having -- all right, then we're going  
 (6) to move on to the purpose for today's conference and that is  
 (7) the -- a presentation in questions with respect to the  
 (8) requested added for issue. I think since the burden to the  
 (9) extent that there's a burden in this kind of procedure would  
 (10) lie with the parties seeking the issues, I'd ask Mr. Beckner  
 (11) and Mr. Webber to go first -- or Mr. Beckner to go first and  
 (12) Mr. Webber since -- well, then Mr. Webber to follow up with  
 (13) other questions, qualifications, how the Bureau sees the  
 (14) issue as framed by Mr. Beckner with your variations.  
 (15) And then Mr. Pettit, Ms. Kiddoo, Mr. Spitzer,  
 (16) however you want to break your time up. But I want to try  
 (17) to keep it as close to ten minutes so by -- it's 10:25 now.  
 (18) By 11:00 by that clock in the back of the room, you know, I  
 (19) expect we'll be moving into the question phase of this. All  
 (20) right. Do you want to start, Mr. Beckner?  
 (21) MR. BECKNER: Certainly. Thank you, Your Honor.  
 (22) Just for the record, Bruce Beckner for Time Warner Cable of  
 (23) New York City and Paragon Cable Manhattan. The first thing  
 (24) I want to say is there's a risk that all of us will fall  
 (25) into the temptation of deciding the merits of the question

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(1) itself in the course of looking at the materials that have  
 (2) been supplied by Liberty, that is, in deciding whether or  
 (3) not there's been a change of control of the licenses or  
 (4) whether or not RCN Freedom is a real party interest in  
 (5) interest in the applications that are before the presiding  
 (6) Judge or whether or not Liberty, in fact, failed to update  
 (7) the Commission as required by 185.  
 (8) That's not our job here today. Our job is simply  
 (9) to determine I believe whether or not there are substantial  
 (10) and material questions as to those issues. And the reason  
 (11) that I raise the point is because of the interest -- slow  
 (12) disclosure of information from Liberty and Freedom on this  
 (13) certainly encourages the idea that maybe the whole thing can  
 (14) be decided on the merits on the basis of a few documents  
 (15) they've chosen to show us. And I would suggest that that's  
 (16) not the case.  
 (17) Substantively, before we get into the details, I  
 (18) think what we have to remember is the -- the old story about  
 (19) the blind men and the elephant. And each blind man grabbed  
 (20) one part of the elephant, you know, the tail, the trunk,  
 (21) whatever, and comes to a different and wrong conclusion  
 (22) about what it is that he's looking at, the point of the  
 (23) story being is that you have to look at the whole elephant  
 (24) to realize it's an elephant  
 (25) In this case, what you have to look at is what I

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(1) would call an organic entity that's created by these  
 (2) documents. It is not simply Bartholdi Cable Company  
 (3) formerly known as Liberty Cable Company. It is not simply  
 (4) Freedom New York Limited Liability Company. It is a web of  
 (5) relationships among these entities that is created by these  
 (6) documents and perhaps by others that we haven't seen. And  
 (7) the reason that I bring that point up is that it's that web  
 (8) of relationships that's got to be examined to answer the  
 (9) question of whether or not there's been a change of control  
 (10) in Liberty's existing licenses or whether or not the real  
 (11) party in interest in the applications that are before the  
 (12) presiding Judge is in fact someone other than what's now  
 (13) known as Bartholdi Cable Company.  
 (14) In simple terms, what the old Liberty Cable  
 (15) Company appears to have done is -- is to have cut up its  
 (16) business into pieces. And it appears to have done that for  
 (17) I think two reasons: 1) to bring a new participant into the  
 (18) business which is RCN, Peter Cuit (phonetic) and Sons, and  
 (19) 2) to insulate the valuable and unique parts of its business  
 (20) which are the exclusive contracts that have to provide  
 (21) multi-channel video programming to residents of apartment  
 (22) buildings in New York from any adverse consequences that  
 (23) might flow from the outcome of the proceeding we're in  
 (24) today.  
 (25) The way that we did this was they took the --

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(1) the -- what I'm going to call the end-user part of the  
 (2) business; that is, the part that involves the electronic  
 (3) delivery of the programming within a building to the people  
 (4) living in each apartment unit in the building --  
 (5) JUDGE SIPPEL: Is that the asset --  
 (6) MR. BECKNER: That's the assets that were sold to  
 (7) this company called Freedom New York Limited Liability  
 (8) Company; Freedom New York, L.L.C. as they call it. So they  
 (9) took that part of the business including the exclusive  
 (10) contracts which Liberty has to provide that service to those  
 (11) buildings and they sold that to Freedom New York. Let's  
 (12) call it Freedom New York. Now, the other part of the  
 (13) business, of course, is the means by which the programming  
 (14) which is distributed through a -- in essence, a cable  
 (15) network within a particular building, the means by which the  
 (16) programming gets to that building.  
 (17) And that means, of course, as we know is either --  
 (18) directly -- is directly or indirectly a microwave or a fast  
 (19) path which is licensed by the FCC. And I say directly or  
 (20) indirectly because, as we know, Liberty is feeding some  
 (21) buildings by means of a coaxial cable that interconnects  
 (22) with another building that they serve by microwave.  
 (23) The microwave part of the business, the license  
 (24) part of it, they have at least on paper kept to themselves.  
 (25) And that's what they've told you that they've done. They've

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(1) kept that to themselves so far. And for the moment, let's  
 (2) just grant -- assume the truth of that statement.  
 (3) JUDGE SIPPEL: There are no facts that you can  
 (4) point to at this point that shows it to be otherwise, are  
 (5) there?  
 (6) MR. BECKNER: Well, I'm going to get to that.  
 (7) JUDGE SIPPEL: All right.  
 (8) MR. BECKNER: I'm going to get to that in the  
 (9) detail part. I just -- the third part of the business is  
 (10) the marketing or the sale, the acquisition of new products  
 (11) for Liberty -- for Freedom as it now is to sell its video  
 (12) programming service. And that business, that function  
 (13) appears to be -- and it's not clear because we don't have  
 (14) all the documents, but it appears to be handled by something  
 (15) called Liberty Video Enterprises which is referred to in  
 (16) these documents as LIVE.  
 (17) So that's how the business has been broken up.  
 (18) And of course, even that break up is not clean in the sense  
 (19) that there are interlocking ownership relationships.  
 (20) Bartholdi has a roughly 20 percent interest in Freedom New  
 (21) York. RCN has I believe about ten percent interest in  
 (22) Liberty Video Enterprises so that the -- in an economic and  
 (23) financial sense, they all have a stake and a link in what  
 (24) happens to each other and in particular, in the ultimate  
 (25) success of -- of the effort to sell video programming to

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(1) people living in apartment buildings in New York; in other  
 (2) words, to continue selling to the existing customers and to  
 (3) add new customers in new buildings.  
 (4) Now, the answer to your question you asked me a  
 (5) minute ago, and that is, was the business really sold or  
 (6) not. What I want to focus on is really to aspects of that  
 (7) question which are set up in these agreements. And I want  
 (8) to remind you that the agreements only provide the form of  
 (9) what's happened. They don't provide the substance. I mean,  
 (10) we know from the Telephone and Data Systems decision, for  
 (11) example, that - you know, that the Court reversed the FCC  
 (12) for having simply looked at contracts without looking at  
 (13) what really was happening on the street.  
 (14) And in this situation where even the form of the  
 (15) arrangement is so complex as this is, and when there are so  
 (16) many interrelationships, it seems to me that it's impossible  
 (17) to really know what's going on and who is controlling what  
 (18) without finding out what's happening on the street; that is,  
 (19) without deposing people and seeing what they're doing. I  
 (20) mean, in particular, we have one agreement, this  
 (21) subcontractor agreement, which didn't even exist at this  
 (22) time this transaction was closed and was signed after Tlme  
 (23) Warner raised the question of changing control before the  
 (24) presiding Judge.  
 (25) So that brings up two questions: 1) does this

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(1) describe what's happening? And if so, what was happening  
 (2) before this document was signed. And secondly, can this  
 (3) document be trusted at all or is it totally self-serving in  
 (4) the sense that it was created to reflect the outcome of  
 (5) unanimous before the presiding Judge.  
 (6) Well, the actual purchase agreement has two  
 (7) interesting features that - that I believe indicate very  
 (8) strongly that there is not control in any practical sense by  
 (9) Bartholdi of these licenses. And again, I want to remind  
 (10) you that I don't have to prove today that what I'm saying is  
 (11) true. All I have to do is show you that there is  
 (12) substantial evidence that it - that it is true. I think  
 (13) these documents do that.  
 (14) First, the hardware that is used to send and  
 (15) receive the microwave gives us great call that - I think  
 (16) it's called the retained assets. So it's called different  
 (17) things in different rooms - retained equipment, I'm sorry.  
 (18) It's called retained equipment. Well, the retained  
 (19) equipment has already been paid for in this asset purchase  
 (20) agreement. And the reason that we know that is because  
 (21) Liberty - or Bartholdi agrees to turn it over to - without  
 (22) further consideration, to agree to turn that equipment over  
 (23) to Freedom New York whenever Freedom New York converts a  
 (24) particular building without paying any further money.  
 (25) And that's - the section numbers are really into

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(1) it, but I'd like just to refer you to page 13 of the asset  
 (2) purchase agreement. It's paragraph - subparagraph E which  
 (3) talks about that. So then you have to look at the  
 (4) transmission services agreement to see what else is  
 (5) happening with respect to that equipment. Well, it turns  
 (6) out that they're supposed to insure that equipment, and this  
 (7) is at paragraph 2(e) of the transmission services agreement,  
 (8) and they're supposed to name RCN - or Freedom as the last  
 (9) payee on the insurance policy. In other words, if the  
 (10) equipment is blown out by lightning or something, the  
 (11) insurance company doesn't pay Bartholdi. It pays RCN - or  
 (12) I'm sorry, Freedom.  
 (13) Bartholdi agrees in the transmission services  
 (14) agreement at subparagraph M not to sell or assign or  
 (15) encumber the retained equipment, not to put a lien on it.  
 (16) Now, what I submit to you, sir, is that if you can't sell  
 (17) something and you buy an insurance policy that pays somebody  
 (18) else if that something is blown up, and you agree at the  
 (19) will of somebody else to transfer ownership or title to that  
 (20) something without receiving any money, then you don't own  
 (21) it. You don't own it because the bundle of property rights  
 (22) that consists of ownership, every one of them you've given  
 (23) up to someone else.  
 (24) Now, I understand that ownership alone is not  
 (25) determinative of change of control. But having said that

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(1) it clearly is a major factor that one should look at in  
 (2) trying to figure out whether change of control has taken  
 (3) place.  
 (4) The second thing I want to point to in the  
 (5) transmit is what use Liberty Bartholdi may make of these  
 (6) licenses. Now, what they've told you is that they're now a  
 (7) private microwave carrier, and they deliver the programming  
 (8) to the buildings that are now owned by Freedom New York.  
 (9) That's true. But they do not have any ability to on their  
 (10) own make use of these paths other than to benefit Freedom  
 (11) New York. And this transmission service contract, when you  
 (12) look at it carefully at paragraph 6, you realize that it is  
 (13) a perpetual contract. There is no way should it choose to  
 (14) for Bartholdi to relieve itself of the obligation to carry  
 (15) the programming for Freedom.  
 (16) Paragraph 6 has an initial five year term, and  
 (17) then the customer - that's Freedom - has the option to  
 (18) either extend the agreement for successive periods of 180  
 (19) days on 30 days notice or to terminate. There is nothing in  
 (20) here that permits - that ever permits Bartholdi to say I'm  
 (21) not doing this anymore for you. It goes on forever. And  
 (22) what I would suggest to you, sir, is that given that  
 (23) contractual provision, by contract, Bartholdi has given up  
 (24) the use of control of the use of that license because it is  
 (25) contractually promised to run that microwave path for

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(1) Freedom forever as long as Freedom wants it.  
 (2) And obviously, Freedom can decide, as the contract  
 (3) says we're not going to renew or we're going to convert the  
 (4) building or whatever. That isn't the point. The point is  
 (5) that Bartholdi never has an opportunity to end the deal and  
 (6) it does not end.  
 (7) The second point that I want to mention to you,  
 (8) and again, this is something that about which we only have  
 (9) partial information, is the asset purchase agreement  
 (10) refers to a non-competition payment - and that's on page 8  
 (11) of the asset purchase agreement - which has been to  
 (12) "certain covenants in accordance with the non-competition  
 (13) agreement" which we don't have here.  
 (14) JUDGE SIPPEL: What page is that on?  
 (15) MR. BECKNER: That's on page 8, sir, of the asset  
 (16) purchase agreement. That's in the definition section.  
 (17) JUDGE SIPPEL: Okay.  
 (18) MR. BECKNER: And there's an additional reference  
 (19) to that fact on page 12 with respect to the payments. I  
 (20) believe it's page 12. I'm sorry, page 11, Section 2.1. It  
 (21) says, "A closing seller shall sell and buyer shall acquire  
 (22) all purchased assets" - I'm leaving out some stuff - "In  
 (23) consideration of the payment by buyer to seller of the  
 (24) initial purchase price, that non-competition payment to the  
 (25) covenants (phonetic) as defined in the non-competition

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(1) agreement", et cetera.  
 (2) Now, the reason I raised that is I don't know who  
 (3) the non-competition covenants (phonetic) are. But I could  
 (4) make a good guess. And the guess that I would make are the  
 (5) Milsteins, the people who own Bartholdi; and that it would  
 (6) be reasonable to assume that Freedom doesn't want the  
 (7) Milsteins going into business and competition with them.  
 (8) But the Milsteins are the ones who own Bartholdi. And what  
 (9) that means is that because they own Bartholdi, they cannot  
 (10) use the licenses or the applications to supply someone else  
 (11) who might want to compete with Freedom New York in the  
 (12) provision of video programming to apartment buildings.  
 (13) In other words, if we have a building at 10 West  
 (14) Sixty-sixth Street, for example, which right now, is run -  
 (15) which is a microwave receive site for Liberty - it's a  
 (16) building that they serve. And now let's suppose that at  
 (17) some point in the future, somebody else wants to get into  
 (18) the same kind of business that Liberty used to be in and  
 (19) that is providing programming by using a microwave  
 (20) distribution as opposed to cables, Bartholdi cannot by  
 (21) virtue of the non-compete supply a microwave path to a  
 (22) customer who wants to compete with Freedom for 10 West  
 (23) Sixty-sixth, just to use a hypothetical example.  
 (24) And I think that's true by - I mean, it's true  
 (25) for two reasons. It's true because the transmission

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(1) services agreement is an exclusive agreement. But even if  
 (2) the - even if the transmission that Bartholdi was making  
 (3) for Freedom terminated the 10 West Sixty-sixth because  
 (4) Freedom said okay, I've got my own license, Bartholdi could  
 (5) not reestablish a transmission for some other customer to  
 (6) that address I believe because of the non-competition  
 (7) agreement. Again, I don't have the agreement; I don't know  
 (8) who the people are. But I am suggesting to you that they  
 (9) may, in fact, be the case. And the relevance of that has to  
 (10) do with who has control of the use of the licenses.  
 (11) JUDGE SIPPEL: Now, I just want to interrupt for a  
 (12) minute. You've gone way past your time.  
 (13) MR. BECKNER: Okay.  
 (14) JUDGE SIPPEL: Do you want to just say one more  
 (15) sentence -  
 (16) MR. BECKNER: Yes, sir.  
 (17) JUDGE SIPPEL: - because of something else that  
 (18) might -  
 (19) MR. BECKNER: Yes, sir. One more sentence. The  
 (20) final point that I want to make is that the subcontract  
 (21) agreement for whatever it's worth is in essence a mirror  
 (22) image of the transmission services agreement. In other  
 (23) words, the transmission services agreement - Bartholdi  
 (24) promises, you know, in warrants that it's going to run the  
 (25) system really well and so on. In the subcontractor

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(1) agreement, Freedom promises that it's going to run the  
 (2) system really well for Bartholdi. Freedom is Bartholdi's  
 (3) customer. The whole thing is incestuous.  
 (4) Contrary to Mr. Price's affidavit, there are no  
 (5) separate employees hired by - on a contract basis by  
 (6) Bartholdi to run the system which is what he said in his  
 (7) affidavit in the first opposition. There is a company hired  
 (8) which he didn't tell you. And that company we now know is  
 (9) Freedom.  
 (10) JUDGE SIPPEL: All right. We're going to be a  
 (11) little bit - I'm going to let everybody have equal time.  
 (12) You're going to get a little bit more because you've got the  
 (13) burden -  
 (14) MR. BECKNER: Thank you.  
 (15) JUDGE SIPPEL: - but not much. All right, Mr.  
 (16) Webber.  
 (17) MR. WEBBER: Thank you, Your Honor. First I'd  
 (18) like to I guess introduce on the record Howard Davenport.  
 (19) He is chief of the Enforcement Division and he is here today  
 (20) because he was in attendance at the January 25th meeting  
 (21) where Liberty and Freedom, at that time an unnamed party,  
 (22) discussed the transactions which we're discussing today with  
 (23) the Bureau for the first time.  
 (24) JUDGE SIPPEL: Okay. Thank you, sir.  
 (25) MR. WEBBER: And you asked for somebody to be

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(1) here.  
 (2) JUDGE SIPPEL: Mr. Davenport, good morning.  
 (3) MR. DAVENPORT: Good morning, Judge.  
 (4) MR. WEBBER: The Bureau looks at this as they  
 (5) really gain two main issues: 1) the first being whether  
 (6) there was a legal - excuse me, a legal transfer occurred.  
 (7) And based upon the review of the documents and the review of  
 (8) the contracts and the Part 94 rules, the Bureau has come to  
 (9) the conclusion that Part 94 does indeed allow the type of  
 (10) situation that was transacted between Liberty and Freedom.  
 (11) And therefore, we don't find that the transfer itself is  
 (12) illegal. However, there is a caveat with that. One of the  
 (13) requirements by Part 94 is that the licensee retain control  
 (14) over the licenses.  
 (15) And that brings us really to what the second issue  
 (16) is, is whether or not there's been any illegal transfer of  
 (17) control. And at this point, the Bureau really doesn't  
 (18) believe there's enough information for us to make a  
 (19) determination. The documents do indeed demonstrate that  
 (20) Liberty has retained legal control of the facilities.  
 (21) However, Commission precedence as well as the U.S. Court of  
 (22) Appeals decision in the Ellis Thompson remand showed that  
 (23) what is really important is actual control, not legal  
 (24) control. And we really have nothing to look at in order to  
 (25) base a decision upon what is actually happening as opposed

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(1) to what legally can happen.  
 (2) The Bureau really in its pleading has outlined  
 (3) three areas where we have questions. And those deal with  
 (4) the day-to-day operations: who is in charge of that; who is  
 (5) in charge or who is making the policy decisions; and who is  
 (6) making personnel decisions.  
 (7) JUDGE SIPPEL: Let me just - you've listed the  
 (8) intermountain and you've found in certain areas that you  
 (9) can't - you don't have sufficient information to determine  
 (10) whether Intermountain standards are met, is that right?  
 (11) MR. WEBBER: That is correct, Your Honor.  
 (12) JUDGE SIPPEL: And you - let me ask you this very  
 (13) quickly - first - briefly. First of all, is - in terms  
 (14) of the Part 94 - the procedures and the practice at the  
 (15) Bureau with respect to Part 94 transactions, do these  
 (16) situations that come up come to your attention, come to the  
 (17) Bureau's attention with any degree of regularity? In other  
 (18) words, are you looking at things like this to determine  
 (19) whether or not it's okay under control standards and this  
 (20) type of thing?  
 (21) MR. WEBBER: This is actually - with Part 94,  
 (22) this is the first situation I've been made aware of where  
 (23) this particular type of private carriage agreement has been  
 (24) entered into. Our Gettysburg office is typically the office  
 (25) that - that would be dealing with this type of situation.

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(1) And our discussions with them, they also say this is very  
 (2) unusual. And so it's not a common thing to my knowledge for  
 (3) somebody operating an 18 Gigahertz operation to end up  
 (4) leasing that out as a private carrier.  
 (5) JUDGE SIPPEL: All right. So there's - I hear  
 (6) exactly what you're saying. All right. I'm sorry. I  
 (7) didn't mean to operate your flow. Go ahead.  
 (8) MR. WEBBER: Really, at this time, the only  
 (9) information we really have which speaks at all to actual  
 (10) control is just a little bit of information we received from  
 (11) our request for interrogatories. And that's particularly  
 (12) the change of employees, that the bulk of the former Liberty  
 (13) employees now work for - work within Freedom's control  
 (14) instead of within Liberty's control; particularly that there  
 (15) are no longer any engineers or maintenance people under  
 (16) Liberty's control and, therefore, the people who would be  
 (17) designing, running the systems, et cetera, are not Liberty  
 (18) employees.  
 (19) However, at this time, the Bureau does not believe  
 (20) that just this little fact alone is sufficient to rise to  
 (21) the level of being a material and substantial question of  
 (22) fact. I guess put a different way, if the Bureau received  
 (23) this type of information in a petition to deny as opposed to  
 (24) being raised in a proceeding where it's been raised as a  
 (25) motion to add issues, the Bureau would not take that

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(1) information and request or write a hearing designation  
 (2) order.  
 (3) Instead, the Bureau would do an investigation  
 (4) under Section 308(B) of the act where we would say that it  
 (5) certainly raises questions; we have eyebrows raised trying  
 (6) to figure out what's going on here. So we would order the  
 (7) carrier to give us more information so we could actually  
 (8) then determine whether or not actual control has indeed  
 (9) stayed with Liberty or whether there is indeed an illegal  
 (10) transfer of control. And at this point without that  
 (11) additional information, we can't make that determination.  
 (12) And Mr. Beckner is correct; at this point, we do  
 (13) not actually have to make the determination that control has  
 (14) indeed left Liberty in order for the issue to be added. But  
 (15) we do at least have to say there's a material and  
 (16) substantial question of fact. And that is still a burden to  
 (17) be met. And the Bureau at this point is not confident to  
 (18) say that that threshold has been met. And that is why the  
 (19) Bureau in its pleading requested a delay of a decision here  
 (20) while we could do our own investigation.  
 (21) We do intend upon sending out - if the issue is  
 (22) not added, upon sending out a Section 308(B) letter where we  
 (23) request additional information from Liberty and from Freedom  
 (24) both. And Mr. Beckner would certainly, or Time Warner would  
 (25) certainly be a party to that, as well. They would be given

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- (1) the opportunity to comment to whatever responses we get from  
 (2) Freedom and Liberty.  
 (3) JUDGE SIPPEL: They would be? Is that - is that  
 (4) normal practice?  
 (5) MR. WEBBER: We have done that with Section 308(B)  
 (6) proceedings previously. One that comes to mind with the  
 (7) Portland, Maine Cellular proceeding, actually that was a  
 (8) control issue, as well. And at two separate times, we sent  
 (9) the company that is currently operating the system -  
 (10) they're a company called Northeast Cellular - we sent two  
 (11) different times Section 308(B) letters requesting additional  
 (12) information about who was running the system. And each  
 (13) time, the company - the company called Portland Cellular  
 (14) was able to comment on the responses to our inquiry. So,  
 (15) indeed, that would be a thing - an option that we could  
 (16) take.  
 (17) JUDGE SIPPEL: But that would not mean necessarily  
 (18) - would you have authority to put people on the record; to  
 (19) require documents and to put people on the record?  
 (20) MR. WEBBER: We certainly would have the authority  
 (21) to require documents. I would like to think that the  
 (22) carriers would certainly cooperate with us if we did ask to  
 (23) interview their people, as well. I guess it would be  
 (24) certainly less formal than a deposition. It may not have to  
 (25) be actually taken on the record. But I would - at this

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- (1) point I would believe that if they decide to not cooperate  
 (2) with us and decline to allow us to interview their employees  
 (3) or their personnel, that alone would be enough for the  
 (4) Bureau then to state there is a material and substantial  
 (5) question of fact, the fact they're not cooperating; they're  
 (6) not letting us get at the facts.  
 (7) JUDGE SIPPEL: Well, let me ask Mr. Beckner. How  
 (8) would you - I've got to ask this to Mr. Webber, too. I  
 (9) know that. But how would you feel about participating in  
 (10) that kind of a situation as opposed to an issue added in  
 (11) going after them with the discovery routine?  
 (12) MR. BECKNER: I'm glad you gave me the chance to  
 (13) respond because that was where I left off on my talk. With  
 (14) due respect to Mr. Webber and the Bureau and to the fact  
 (15) that this apparently has been done before, I don't think  
 (16) it's right. And I've looked at a couple of recent D.C.  
 (17) Circuit decisions that would appear to support that although  
 (18) I'm not going to tell you that the issue has ever been  
 (19) before the courts. And the reason that it's not right is  
 (20) that the application is now not before the Bureau. It is  
 (21) before the presiding Judge.  
 (22) 308(B) quite clearly - and 308(B) goes back all  
 (23) the way to the old Radio Act; I mean, it predates even the  
 (24) Communications Act - was and has been interpreted by the  
 (25) courts to afford the Commission and the Bureau a way of

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- (1) finding out additional information beyond pursuing the  
 (2) application without having to go to a hearing. They are -  
 (3) a hearing and a 308(B) request are alternative and  
 (4) complementary revenues. I mean, the idea that we would have  
 (5) in effect a side proceeding running on the same track as  
 (6) this proceeding with the Bureau doing 308(B) requests is  
 (7) just - I don't think it makes much sense and I don't see  
 (8) any authority for it.  
 (9) JUDGE SIPPEL: Well, the thing is - well, let's -  
 (10) - we'll worry about - once we find out what the procedure's  
 (11) going to be, we'll worry about the authority on this one.  
 (12) But let me ask you this. If the Bureau feels - the Bureau  
 (13) feels that there are questions, and serious questions -  
 (14) I'll characterize it for Mr. Webber - serious questions  
 (15) with respect to control, and these are actual control  
 (16) issues, that they don't have the answers to that they'd like  
 (17) to get the answers to, if the answers came out a certain  
 (18) way, then they would feel strongly - again, I'm putting  
 (19) words in his mouth - but they would take a firm position  
 (20) with respect to seeking an issue added because they would  
 (21) have concluded that there is a substantial question of fact  
 (22) with respect to that matter.  
 (23) Now, that's - as I view it, that's what they're  
 (24) asking for. They're asking for an opportunity to use a -  
 (25) it's not - it's not a hearing procedure, but there - to

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- (1) use a Commission procedure to seek to get more information  
 (2) Liberty would have an interest it would seem to me in  
 (3) cooperating in that kind of a - in that kind of an  
 (4) arrangement.  
 (5) And if there was a time frame, a lot of it  
 (6) wouldn't have to - in effect, it would be giving an  
 (7) extension of time to develop more information to one of the  
 (8) parties in the case. That's essentially what I would see it  
 (9) to be. And the only way of going after that information is  
 (10) to add an issue and then go into the discovery phase and all  
 (11) that kind of stuff.  
 (12) MR. PETTIT: Your Honor, may we - -  
 (13) JUDGE SIPPEL: Yes, sir. You will. I don't mean  
 (14) to - believe me. Absolutely.  
 (15) MR. PETTIT: I'm now coming into my time and I  
 (16) guess Mr. Weber's time, as well.  
 (17) JUDGE SIPPEL: No, we'll get into -  
 (18) MR. PETTIT: It strikes me as an extremely  
 (19) creative approach. Liberty and Bartholdi would certainly  
 (20) cooperate in any sort of an investigation. And as somebody  
 (21) used to describe the Commission's authority for this, it -  
 (22) it strikes me the Commission does, in fact have authority  
 (23) under 308 and under 403 and other provisions, in fact, to  
 (24) engage in the investigatory activities; to - and I would  
 (25) say, in fact, there are procedures to - to compel

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- (1) appearances and that sort of thing.  
 (2) I don't see the authority of the Commission as  
 (3) being a problem in that. And the reason, in fact, that it  
 (4) is appropriate with all due respect to Mr. Beckner is that  
 (5) we are in a situation very much like a petition to deny as  
 (6) Mr. Webber said. That's sort of the procedural posture  
 (7) we're in with the motion to enlarge issues. It is the  
 (8) burden of Time Warner to show a prima facie case. I mean,  
 (9) we certainly think that that has not been done here and I  
 (10) gather that the Bureau agrees with that.  
 (11) It is certainly not Bartholdi's burden to prove  
 (12) the negative, to show the absence of a substantial material  
 (13) question of fact. That having been said, if the Bureau has  
 (14) questions, it certainly may pursue them. And as I say,  
 (15) Liberty would certainly comply with that.  
 (16) MR. KIRKLAND: Your Honor, with your sufferance,  
 (17) if I could be heard just to amplify a point maybe by Mr.  
 (18) Beckner.  
 (19) JUDGE SIPPEL: Sure.  
 (20) MR. KIRKLAND: In terms of the legality of this  
 (21) proceeding, I think it's not creative. It's extraordinary.  
 (22) Your Honor, because what you would then have - right now  
 (23) the Bureau is a party to this proceeding. Once a hearing  
 (24) designation order has been issued, the Bureau becomes a  
 (25) party. And that procedure was established in order to

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- (1) preserve the integrity and decision making. What Mr. Webber  
 (2) is proposing is that the Bureau reassume a role as a  
 (3) decision maker in this proceeding in connection with the  
 (4) 308(B) investigation.  
 (5) And to have the Bureau acting as both the decision  
 (6) maker and a party in this proceeding I would submit raises  
 (7) procedural complexities that will boggle everyone's mind. I  
 (8) think it also puts extraordinary pressure on the kinds of -  
 (9) procedural protections that the Commission has adopted to  
 (10) avoid precisely this kind of problem. So Cable Vision feels  
 (11) quite strongly that that remedy is not only, as I said,  
 (12) extraordinary, but probably illegal and inconsistent with  
 (13) the procedural framework the Commission has adopted.  
 (14) MR. PETTIT: Your Honor, if I may, that I think is  
 (15) legally preposterous. The Bureau is a party to the  
 (16) proceeding. Mr. Webber may write me a letter this afternoon  
 (17) asking me whatever information he wants to and I may respond  
 (18) to that. And he may use the information in forming the  
 (19) Bureau's opinion. There is absolutely nothing that has to -  
 (20) do with his status as a party or the Bureau's status as a  
 (21) party to prevent him from doing that. It is perfectly  
 (22) proper. And that is in substance what he's asking to do  
 (23) MR. BECKNER: The question is, Bob, could I write  
 (24) you the same letter? Could I - could I demand -  
 (25) MR. PETTIT: I might not write you back, Bruce.



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(1) but you may. Of course, Mr. Webber is talking -  
 (2) JUDGE SIPPEL: Let's not get this carried too far  
 (3) afield. Ms. Kiddoo.  
 (4) MS. KIDDOO: Just one point, and that is that I  
 (5) think that Mr. - that what I think that Cable Vision's  
 (6) counsel is missing here is that this issue isn't designated.  
 (7) And as the Bureau has said, after review of the agreements.  
 (8) there has been no meeting of the burden of proof to get it  
 (9) designated into this proceeding. Therefore, the Bureau,  
 (10) since it does have questions, has the statutory right to  
 (11) investigate what it wants to do with respect - what it  
 (12) wants to investigate with respect to an application. And  
 (13) that's what he is proposing to do here.  
 (14) But you can't lose sight of the fact that nobody  
 (15) has met the burden of a material and substantial issue of  
 (16) fact that needs - that rises to the level of warranting an  
 (17) enlargement of this proceeding.  
 (18) JUDGE SIPPEL: Well, that's what I'm trying to -  
 (19) that's what I'm trying to resolve.  
 (20) MR. PETTIT: Your Honor, it is certainly far  
 (21) preferable I think from our perspective - we're certainly  
 (22) not asking for an investigation here. But it is certainly  
 (23) preferable to designating an issue and, you know, starting  
 (24) everybody's meter in this room running with the cost and the  
 (25) delay, that depositions and discovery will entail for

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(1) possibly, and we would certainly say, no reason at all.  
 (2) JUDGE SIPPEL: Well, I'm acknowledging the fact -  
 (3) I mean, I'm aware both from my own experience and what I'm  
 (4) seeing here that control issues are extremely fact  
 (5) intensive. And you know, once we go down that road, it's -  
 (6) it could become a long and painful road. Just a minute, Mr.  
 (7) Beckner. And with respect to what Mr. Kirkland said, I  
 (8) mean, I know that there's a serious legal issue of the  
 (9) running parallel procedures. I think it was the old Parrot  
 (10) case here in the District. I mean, you don't - you can't -  
 (11) - you can't run parallel proceedings and use an  
 (12) administrative procedure to feed an ongoing criminal  
 (13) investigation. And that's not what we're talking about.  
 (14) This is just a - it's another tool - I look upon  
 (15) it as basically being another discovery tool if it were done  
 (16) in the context that Mr. Webber has outlined it; that is that  
 (17) Time Warner would have an opportunity to comment on it and  
 (18) it would come to my attention. I believe I'm - I'm  
 (19) assuming that you mean that it would be completed before the  
 (20) record is closed in this case and that I would be told, you  
 (21) know, where the Bureau has come out on their inquiry, or, of  
 (22) course, it might be that well, yes, you guys have been in  
 (23) cooperation but you haven't had time, something like that.  
 (24) But I'm saying that that's the scenario I think that you're  
 (25) contemplating, isn't it?

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(1) MR. WEBBER: That is correct, Your Honor. It  
 (2) could potentially reach beyond that. I mean, we'll  
 (3) certainly keep you informed obviously if we find more  
 (4) serious problems and we come to a level where we believe  
 (5) there is material and substantial question of fact. We may  
 (6) desire it to go beyond the 18 licenses at question here and  
 (7) decide it necessitates replication proceedings. But that  
 (8) would be apart from this, as well. But I'm kind of jumping  
 (9) the gun there. If - if you mean by the close of record by  
 (10) August 12th when -  
 (11) JUDGE SIPPEL: No.  
 (12) MR. WEBBER: Oh.  
 (13) JUDGE SIPPEL: I mean by the time that this - by  
 (14) the time that I would be completing writing what it is that  
 (15) you're going to submit to me in the summary decision form  
 (16) assuming that I were to grant summary decision. If I turn  
 (17) down summary decision, of course, then we're back in here  
 (18) again anyway.  
 (19) MR. WEBBER: That is correct, Your Honor. I mean,  
 (20) I - I would even hope that we could be done by August 12th.  
 (21) There's no guarantee. I mean, we expect to move quickly on  
 (22) this if indeed this is the path we will be taking. And we  
 (23) would certainly keep you informed and endeavor to have a  
 (24) decision to you or have our findings to you prior to the  
 (25) close of the record.

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(1) JUDGE SIPPEL: All right. Well, let me just keep  
 (2) this open for the time being because, you know, what you  
 (3) wrote in your last pleading which is what I'm most  
 (4) interested in hearing, that is, the questions that you have,  
 (5) but these are questions that are not substantial questions,  
 (6) this really getting down to almost a metaphysical nicety. I  
 (7) think what was written by the Court in Citizens for Jazz is  
 (8) what I was thinking of when I read that. And that is that  
 (9) the Court in that case said that the statute in effect says  
 (10) that the Commission must look into the possible existence of  
 (11) a fire only when it is shown a good deal of smoke.  
 (12) And the series, the litany of questions that you  
 (13) raised, it certainly in my judgement anyway would constitute  
 (14) smoke. It's a question of whether - how much smoke is it.  
 (15) You're saying it's not quite enough smoke. And of course,  
 (16) Time Warner is going to say well, it really isn't smoke.  
 (17) That's mist or something else. And the standard, it gets to  
 (18) be really slippery when you come this close to it.  
 (19) MR. PETTIT: I'd say it's more like two lawyers  
 (20) rubbing sticks together.  
 (21) JUDGE SIPPEL: All right. Well, you know, I've  
 (22) read the papers and you certainly have made your point  
 (23) clear, Mr. Pettit, in terms of how you view these documents  
 (24) as being clearly the answer to the question that I'm  
 (25) hearing. However, I'm hearing different things from the

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(1) other side of the table in different ways. And that's why  
 (2) we're here. That's why I'm trying to get to the bottom of  
 (3) it because I don't want to send you down that road.  
 (4) I don't want to put this case in that posture  
 (5) where we're simply just trying to backfill what the  
 (6) documents clearly show. So let me - let me - Mr. Webber,  
 (7) I've kind of cut off into your time; but I think - have I  
 (8) basically paraphrased what it is that the Bureau's position  
 (9) is in regards to this?  
 (10) MR. WEBBER: Yes, Your Honor.  
 (11) JUDGE SIPPEL: All right. Let me ask Mr. Pettit  
 (12) and the Time Warner - I'm sorry, the Liberty side of the  
 (13) table to make your presentation.  
 (14) MR. PETTIT: I will be brief, Your Honor, because  
 (15) I know you have questions and we're anxious to get to them,  
 (16) as well. And now having blessed in some sense the 308  
 (17) investigation, I guess I'm going to try to tell you why  
 (18) one's not necessary and why you should go ahead and deny the  
 (19) motion.  
 (20) You know, I was reminded listening to Mr. Beckner  
 (21) about the not seeing the forest for the trees. I mean, he  
 (22) does tend to focus on a couple of trees here. But there's a  
 (23) substantial forest of documentary evidence. And not just  
 (24) documentary evidence. And this is perhaps where I part a  
 (25) little away from the Bureau. But the declaration

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(1) Bartholdi's presence filed under penalty of perjury,  
 (2) declarations from Freedom executives, as well - or a  
 (3) Freedom executive all of which shows that Bartholdi is -  
 (4) the principals of Bartholdi are in control of Bartholdi, and  
 (5) that the Freedom - company Freedom is not in control of  
 (6) Bartholdi.  
 (7) And we think that those facts go mostly to du jour  
 (8) control and to de facto control. All of the documentary  
 (9) evidence, as I think Mr. Webber went through, belies any  
 (10) notion that Freedom is the du jure owner of Bartholdi. The  
 (11) agreements, in fact, are quite faithful to the long  
 (12) established Commission precedence in this area.  
 (13) But the agreements and the declaration of Mr.  
 (14) Price and the declaration of Mr. Rosenblum also reflect how  
 (15) these companies operate in fact. And Time Warner which has  
 (16) the burden of - on this issue simply has not shown  
 (17) otherwise. They do, Mr. Beckner, shows what is happening on  
 (18) the street.  
 (19) You know, Time Warner cites absolutely no  
 (20) precedent. And it would be impressive I think to add this  
 (21) issue. And I suspect that none is cited. Freedom has no  
 (22) equity interest in the licensee. It has no motive to  
 (23) conceal. Freedom got its own licenses here. Freedom has  
 (24) not played a dominant role in the prosecution of these  
 (25) applications, the applications that are before this Court.

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(1) In fact, it's played no role at all. And Bartholdi's  
 (2) principals are not employees of Freedom in any sense of the  
 (3) word. It is certainly true of the intermountain criteria,  
 (4) as well, as we go through in our pleading. Your Honor, I  
 (5) think I will leave it at that and go into your question  
 (6) period.  
 (7) JUDGE SIPPEL: Okay.  
 (8) MR. PETTIT: But I would focus the Court on Mr.  
 (9) Price's affidavit which clearly speaks to how this  
 (10) arrangement operates in fact, not - not just according to  
 (11) the documents. Mr. Price avers, in fact, that it does  
 (12) operate just as a - as the agreement cited.  
 (13) JUDGE SIPPEL: All right. Ms. Kiddoo, do you want  
 (14) to add anything to that or -  
 (15) MS. KIDDOO: Well, Your Honor, I don't think I  
 (16) have a lot to add.  
 (17) JUDGE SIPPEL: Okay.  
 (18) MS. KIDDOO: I think Mr. Pettit has stated our  
 (19) position, as well, with respect to this transaction. We do  
 (20) come at it a little bit differently not being a party to  
 (21) this proceeding and not having had any of the issues that  
 (22) were designated pertain to anything that had to do with  
 (23) Freedom New York or any of its affiliates. Freedom New York  
 (24) had no dealings with Liberty Cable prior to negotiating this  
 (25) transaction which was consummated in early March.

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(1) The fact of the matter is that anything that is at  
 (2) issue here with specifically liability for anything that is  
 (3) at issue here was specifically retained by Bartholdi Cable  
 (4) and Freedom was indemnified in the contracts. There is  
 (5) nothing that the outcome of this proceeding would have an  
 (6) impact on other than what Mr. Beckner tries to argue is a  
 (7) problem and a question which is the situation of the  
 (8) equipment. Mr. Beckner talks about the fact that he  
 (9) believes that the equipment is already owned by Freedom.  
 (10) That's not the case. The equipment is owned by Bartholdi.  
 (11) But even if it were owned by Freedom, that's not  
 (12) inconsistent with the Commission's rules and I didn't hear  
 (13) any cases cited that say that it would be. The fact of the  
 (14) matter is that Bartholdi has control of that equipment so  
 (15) long as the equipment is used to provide transmission  
 (16) services by Bartholdi pursuant to its licenses from the FCC  
 (17) He also talked about - the other fact that Mr.  
 (18) Beckner talked about that raised his questions was the  
 (19) notion that somehow what Bartholdi did was try to insulate  
 (20) certain portions of its business from this proceeding.  
 (21) Well, first of all, I'm not sure that Bartholdi's  
 (22) programming interests had anything to do with any of the  
 (23) issues designated in this proceeding. My understanding of  
 (24) this proceeding is that it has to do with licenses held by  
 (25) Bartholdi and the services that they provide - the

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(1) microwave services.  
 (2) But beyond that, the consequences really haven't  
 (3) shifted. I mean, the only thing that's shifted I suppose is  
 (4) the risk here. To the extent that - and I think it's a  
 (5) very far fetched notion - but to the extent to which the  
 (6) licenses that are providing transmission services are  
 (7) jeopardized by this proceeding, the fact is they're  
 (8) jeopardized. And to the extent that that's the case, then  
 (9) Freedom would have to make other arrangements other than  
 (10) transmission services to provide a service to its customers.  
 (11) So it doesn't really seem to insulate a whole lot from this  
 (12) Commission's proceeding to say that the subscribers were  
 (13) transferred to Freedom.  
 (14) JUDGE SIPPEL: I'm not sure that I follow that all  
 (15) the way. You're saying that - that it's - you're saying  
 (16) that the service contracts with the customers are in  
 (17) jeopardy to a point by virtue of the fact that there is this  
 (18) proceeding going on.  
 (19) MS. KIDDOO: Well, Mr. Beckner, if I understood  
 (20) his point, was saying that somehow what Bartholdi was  
 (21) attempting to do by selling its subscriber assets to  
 (22) Freedom will somehow insulate portions of its business from  
 (23) this proceeding. It did not transfer the licenses. The  
 (24) licenses are still being used by Bartholdi and controlled by  
 (25) Bartholdi to provide private carrier transmission services.

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(1) So -  
 (2) JUDGE SIPPEL: Is this the unjust enrichment  
 (3) argument basically?  
 (4) MS. KIDDOO: I think that's - I think that's what  
 (5) he was getting at although he did not use those words this  
 (6) morning.  
 (7) JUDGE SIPPEL: I've seen this in his brief. Is  
 (8) that it, Mr. Beckner, that -  
 (9) MR. BECKNER: I'm not - I'm not today trying to  
 (10) argue unjust enrichment or any of these things. I'm just  
 (11) describing what I believed happened and what I believe the  
 (12) purpose was of what happened. And I don't want to take up  
 (13) Ms. Kiddoo's time, but the short answer is if Liberty is  
 (14) providing programming or RCN is providing programming in a  
 (15) particular building by means of a microwave and it's found  
 (16) to be disqualified from holding the license for that  
 (17) microwave, then it can't provide the programming to the  
 (18) people in the building because there's no way to get it  
 (19) there and that includes any other buildings that might be  
 (20) linked by - by cable.  
 (21) JUDGE SIPPEL: Well, I don't want to get too far  
 (22) afield but -  
 (23) MS. KIDDOO: Well, perhaps what Mr. Beckner said  
 (24) this morning was that somehow Bartholdi was attempting to  
 (25) this transaction to insulate valuable pieces of its business

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(1) from any adverse consequences from this FCC proceeding. My  
 (2) point is that I'm not sure that they have insulated anything  
 (3) for precisely the reasons that Mr. Beckner just stated.  
 (4) JUDGE SIPPEL: All right. Okay. I'm going to  
 (5) leave it there. I want to get on to some things. And I  
 (6) don't mean to say that that's not important. But I want to  
 (7) get - be sure that I have some questions answered. Now,  
 (8) did you want - is there anything more that you wanted to  
 (9) say on this then, Ms. Kiddoo? Are you finished with your  
 (10) opener?  
 (11) MS. KIDDOO: Yes, sir.  
 (12) JUDGE SIPPEL: Okay. All right. Let me - let me  
 (13) start in by being sure that - now, I understand - I'm  
 (14) going to just say preliminarily from what I understand and  
 (15) from what everything that has been shown to me indicates,  
 (16) this - the company is now - Liberty Cable Company is now  
 (17) doing business as Bartholdi Cable Company. Now, and there's  
 (18) been - the Commission was informed by the appropriate  
 (19) correspondence back in - I believe it was back in January  
 (20) or February of this year that there was going to be the name  
 (21) change. We don't have to get - I'm sorry, it was in March.  
 (22) Now, Mr. Milstein - the three Mr. Milsteins own  
 (23) 100 percent of Bartholdi, is that correct?  
 (24) ALL: Yes, Your Honor. That's correct. That's  
 (25) right.

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(1) JUDGE SIPPEL: And the reason that the name was  
 (2) changed to Bartholdi was because one of the assets that  
 (3) Freedom purchased was the name, Liberty Cable?  
 (4) ALL: Yes. That's correct, Your Honor.  
 (5) JUDGE SIPPEL: All right. Now, so there's no -  
 (6) there's no hidden group called the Bartholdis or anything  
 (7) that's involved in this at all?  
 (8) MR. SPITZER: Mr. Bartholdi, Your Honor, I think -  
 (9) - I did not come up with the name - designed the Statute of  
 (10) Liberty. I think that was the genesis of the name.  
 (11) JUDGE SIPPEL: Okay. That's -  
 (12) MR. SPITZER: There are no Bartholdis that I'm  
 (13) aware of.  
 (14) JUDGE SIPPEL: I'm just trying to - I'm just  
 (15) trying to clear - I'm just trying to get everything clear  
 (16) in my own mind. I'm not trying to look for another issue  
 (17) I know that I found this -  
 (18) MR. PETTIT: I think that the Bartholdis are in  
 (19) control of Time Warner.  
 (20) JUDGE SIPPEL: Well, I found that Mr. - the Benz  
 (21) of the Mercedes Benz group had married a woman from  
 (22) Barcelona whose name was Mercedes and that's why we have  
 (23) Mercedes. Who knows. Okay. Now, then there was this  
 (24) meeting with the Bureau on the January 25th at which I take  
 (25) it the purpose of the meeting was to kind of scope this out



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(1) and get a feel from the Bureau as to whether or not they  
 (2) would have any problem with it. Is that essentially it?  
 (3) MR. PETTIT: Well, I think there were two purposes  
 (4) to the meeting. One was that, Your Honor, which as the  
 (5) Bureau knows, there are a lot of meetings in the Wireless  
 (6) Bureau much to the Wireless Bureau's regret I think a lot of  
 (7) the time. But there is sort of a scoping out, bait and  
 (8) suspenders approach to sort of checking out transactions.  
 (9) So that was clearly one of the objects of the meeting.  
 (10) The other was to confirm our reading of Part 94 of  
 (11) the rules that a private carrier system would still be  
 (12) allowed under the rules. And, you know, again, that was our  
 (13) reading. I take it it's the Bureau's reading, as well. And  
 (14) that was a second purpose of the meeting.  
 (15) JUDGE SIPPEL: Well, what is that? 94.17 is the  
 (16) private carrier? I mean, couldn't that be done with a phone  
 (17) call or - I mean, what's the meeting? And the meeting is  
 (18) with the Bureau and the Bureau doesn't really know who  
 (19) they're meeting with. That's how it's come across to me.  
 (20) They knew that they were meeting with Liberty's counsel, but  
 (21) they didn't know who the other - that somebody else was  
 (22) there, but they didn't know who they were meeting with.  
 (23) MS. KIDDOO: Your Honor, one of the things that I  
 (24) could add to Mr. Pettit's two reasons for the meeting is a  
 (25) third reason. This is when Freedom purchased the asset -

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(1) was negotiating to purchase the assets of Bartholdi which at  
 (2) that time was called Liberty. It was aware of this  
 (3) proceeding and was aware that there had been questions  
 (4) raised in petitions and that the Bureau was seriously  
 (5) investigating those issues.  
 (6) It was, therefore, I think when we reviewed the  
 (7) transaction and satisfied ourselves that it was consistent  
 (8) with the FCC's rules and that, in fact, no approvals were  
 (9) needed in order to transfer the assets that were being  
 (10) transferred. It was our view that because we had the  
 (11) question that we wanted - we had never ourselves been  
 (12) familiar with which is the transfer - the change in the  
 (13) category of services being provided by Bartholdi which was,  
 (14) you know, a full service programming and microwave  
 (15) combination to a private carrier type of service - that  
 (16) that was sufficiently different that we felt that it was  
 (17) important with talking to the Bureau about any of the issues  
 (18) that were being investigated with respect to prior licensing  
 (19) issues, to run that structure of the transaction by the  
 (20) Bureau to make sure that they were comfortable with the  
 (21) structure of the deal.  
 (22) Now, it was before we had entered into an asset  
 (23) purchase agreement because we felt that we needed to make  
 (24) ourselves comfortable that there were no issues we didn't  
 (25) understand here with this structure. And we satisfied

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(1) ourselves with that and the asset purchase agreement was  
 (2) entered into a couple of weeks later.  
 (3) But the very fact that this investigation of the  
 (4) Bartholdi licensing was going on was one of the reasons why  
 (5) we felt it was important to meet with the Bureau and just  
 (6) make sure that the structure was something that didn't cause  
 (7) any unknown issues as it relates to their investigation of  
 (8) other Bartholdi licensing questions.  
 (9) JUDGE SIPPEL: Well, how long was this being -  
 (10) this asset purchase concept or the - how long was that -  
 (11) if I can call it the deal, how long was that deal being  
 (12) discussed between Liberty and Freedom?  
 (13) MS. KIDDOO: In a deal of this magnitude, it takes  
 (14) some time. I - it was certainly in the last month or two  
 (15) of 1995 that to my knowledge the negotiations started. So  
 (16) it went on for -  
 (17) JUDGE SIPPEL: So it was late '95?  
 (18) MS. KIDDOO: Late '95.  
 (19) MR. PETTIT: Mr. Price in his affidavit does  
 (20) reflect the negotiation, the transaction took some weeks  
 (21) before execution of the agreement on February 20th.  
 (22) JUDGE SIPPEL: Well, some weeks, that's not a long  
 (23) time. I mean, you're talking about general assets for 45  
 (24) million dollars.  
 (25) MR. SPITZER: This was a negotiation that began in

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(1) late '95 and continued with increasing intensity through the  
 (2) end of February and then into early March.  
 (3) MS. KIDDOO: There were a lot of discussions. Your  
 (4) Honor, prior even to the first word being written on paper.  
 (5) And that's -  
 (6) JUDGE SIPPEL: That's what I'm trying to find out,  
 (7) you know, what - you know, this goes - but it was sometime -  
 (8) around the end of '95 that people actually started talking  
 (9) in serious terms about this.  
 (10) MR. SPITZER: Can I add - I don't know if this is  
 (11) the fourth reason or if this is already subsumed in some way  
 (12) beneath the reasons that Bob and Jean have alluded to.  
 (13) There was also a concern given the regulatory uncertainty  
 (14) surrounding what was then called Liberty, that Liberty never  
 (15) be accused of consummating a transaction such as this behind  
 (16) the back of the Commission.  
 (17) This was front and center in our minds, that we  
 (18) didn't want anybody ever to say you didn't reveal this to  
 (19) the Commission which unfortunately was ultimately what was  
 (20) said anyway. But it was very critical to us that we be  
 (21) forthright with the Commission in saying here is a  
 (22) transaction that's being considered and here are the  
 (23) parameters of this transaction.  
 (24) JUDGE SIPPEL: Okay. So you were - so Liberty -  
 (25) MR. SPITZER: And there was an obligation to do

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(1) so.  
 (2) JUDGE SIPPEL: Liberty in a sense then was under  
 (3) gun. They knew that the Commission was focused. I mean,  
 (4) they were having these problems with New York and they  
 (5) knew -  
 (6) MR. SPITZER: They were in the guillotine. Your  
 (7) Honor, with the blade coming down.  
 (8) JUDGE SIPPEL: All right. So they knew this  
 (9) though in late '95 when these discussions first started to  
 (10) kick in. So I take it that Freedom was told this, too.  
 (11) MR. SPITZER: That's what Swidler and Berline  
 (12) issued the earlier - at the aspects of this.  
 (13) JUDGE SIPPEL: So when you - now, so then when  
 (14) you went to the meeting in January, was the Commission staff  
 (15) told this, I mean, of your frame of mind at that time and  
 (16) you told them up front? You said look, we want to talk to  
 (17) you about a deal that we're thinking about putting together  
 (18) but we've got some very - we want to be sure that you're  
 (19) aware of this up front because we know that we're under  
 (20) the - we're being under the scope here in addition to the  
 (21) fact that we want to get your reaction to the deal.  
 (22) MS. KIDDOO: That was specifically raised, yes.  
 (23) sir.  
 (24) JUDGE SIPPEL: Okay. Now, Mr. - I don't want  
 (25) to - you know, this is not a testimonial session, but this

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(1) is an explanation that I'm getting from Liberty/Freedom, and  
 (2) the representations and the correspondence between the  
 (3) Bureau and Mr. Pettit's office and representations in the  
 (4) pleadings seem to indicate that there was a different  
 (5) reaction to what happened or a different understanding as to  
 (6) what was going on at the meeting.  
 (7) MS. KIDDOO: Your Honor, I just want to make it  
 (8) clear though that while I say that it was specifically  
 (9) raised that we were concerned about what was going on with  
 (10) Liberty, I wanted to specifically mention that it was  
 (11) Liberty that was the seller here. I did not disclose the  
 (12) name of RCN or Freedom because at that time, the agreement  
 (13) had not been struck and it might never have been struck  
 (14) depending upon in part the outcome of that meeting. So that  
 (15) was not disclosed.  
 (16) JUDGE SIPPEL: Okay. Well, they had somebody at  
 (17) the meeting that was representing them?  
 (18) MS. KIDDOO: Myself and a colleague of mine, yes.  
 (19) MR. WEBBER: I'd also like to just point out one  
 (20) thing quickly and then you're free to question Mr.  
 (21) Davenport, of course. But the Bureau is taking the stance  
 (22) of what occurred in this January 25 meeting is really not  
 (23) relevant to the issues of whether this issue should be added  
 (24) or not. I mean, we're really focusing on the real thrust or  
 (25) the real important fact of whether this should be this

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(1) added, is whether or not control has remained with Liberty  
 (2) And obviously, prior - and we're talking actual control.  
 (3) And obviously, prior to Liberty even selling their assets,  
 (4) they would have had control at that point.  
 (5) They could not have discussed what would have  
 (6) occurred or what actually is occurring after this  
 (7) contemplated transaction. And so there's no way that could  
 (8) have been discussed in January, what would have actually  
 (9) happened, because nothing had - it hadn't happened yet.  
 (10) And I guess with that caveat, if you think, you know, you  
 (11) need to go into the January meeting more, Mr. Davenport  
 (12) certainly is here to answer those questions.  
 (13) JUDGE SIPPEL: Well, I'm just - I really just am  
 (14) trying to get the gist. Everything you say - I accept  
 (15) everything you say with the exception that the  
 (16) representations in the pleadings are to the effect from the  
 (17) Liberty side that, you know, we told the Bureau everything  
 (18) that we wanted to do and we walked away with the impression  
 (19) that there was no problem. And I'm asking Mr. Davenport, is  
 (20) that the impression that you gave them, that there was - I  
 (21) mean, that you were in effect writing it off and saying  
 (22) well, no, you don't see any problem with that.  
 (23) MR. DAVENPORT: Well, let me put the meeting into  
 (24) context if I might. First off, the Bureau of the FCC had  
 (25) just returned recently from the federal furloughs. And

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(1) everyone had quite a bit of backlog work. Also at that  
 (2) time, Time Warner and Paragon had filed petitions to deny  
 (3) against Liberty. I was, therefore, asked to attend this  
 (4) meeting to make certain that Liberty nor the undisclosed  
 (5) white knight got into any areas which might constitute an ex  
 (6) parte contact. So that's the context in which I was viewing  
 (7) the meeting, making certain that nothing was said which  
 (8) might constitute an ex parte contact.  
 (9) Keep in mind, Time Warner had already filed two -  
 (10) I think it was two allegations saying that Liberty had made  
 (11) ex parte contacts with the Bureau. So I guess I was there  
 (12) for an enforcement - a police purpose, if you will, to make  
 (13) certain that there were no inadvertent ex parte contacts. I  
 (14) think the sole area where there may be some disagreement  
 (15) concerns the transmission agreement.  
 (16) Liberty and the white knight made it very, very  
 (17) clear that they were going to proceed under Part 94.17, and  
 (18) that in their view, there was no need for regulatory  
 (19) approval on the part of the Commission, but that they would  
 (20) file the transmission agreement with our Gettysburg office.  
 (21) JUDGE SIPPEL: The transmission - the service  
 (22) agreement -  
 (23) MR. DAVENPORT: The transmission service  
 (24) agreement, yes. Beyond that, I don't know that there's any  
 (25) area of disagreement as to what occurred at the meeting.

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(1) And again, I want to emphasize that I was but one person who  
 (2) attended that meeting on the part of the Bureau. And the  
 (3) context in which I was attending and listening was to make  
 (4) certain that there were no ex parte contexts concerning the  
 (5) petitions to deny.  
 (6) JUDGE SIPPEL: Okay. Okay. Now, of course, this  
 (7) disclosure, it does have some bearing, too, in terms of  
 (8) the - this 1.65 issue. I mean, one of the big complaints  
 (9) certainly that struck me was the fact that they had gone  
 (10) forward with this while this proceeding was going on, and  
 (11) then all of a sudden, bang, we learn of it through 10-Ks  
 (12) coming up and, you know, being found at the SEC and this  
 (13) type of thing. Apparently, there was - well, we're hearing  
 (14) it here today. So I think this does have some relevance in  
 (15) terms of what we're - what the ultimate issue is going to  
 (16) coming out on these motions.  
 (17) Is there anything else that you wanted to  
 (18) characterize with respect to that meeting then, Mr. Pettit?  
 (19) MR. PETTIT: No. You know, we went in with  
 (20) specific objectives in mind and thought that they were  
 (21) accomplished as I would say is sort of par for the course  
 (22) for a meeting of that kind. I'm sure we all had different  
 (23) recollections as would be normal of exactly what was said  
 (24) On the filing in Gettysburg, for example, what I took away  
 (25) from the meeting was we would look at the rules and if - we

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(1) would file it where it was required to be filed. I do  
 (2) remember someone raising whether we needed to file in  
 (3) Gettysburg. As it turns out, that's not the case.  
 (4) But that is how I would remember the meeting. And  
 (5) as Mr. Webber has said, I would say that it is of marginal  
 (6) relevance to the question of a transfer. The meetings  
 (7) happen all the time. I don't think any licensee, you know,  
 (8) relies entirely on what is said in the course of a meeting,  
 (9) particularly when, as the Bureau says, there wasn't even an  
 (10) agreement at the time. There was no definitive agreement.  
 (11) The documents in that regard speak, you know, by themselves  
 (12) JUDGE SIPPEL: Okay.  
 (13) MR. KIRKLAND: Your Honor, with all due  
 (14) trepidation in light of my role here as essentially the  
 (15) fourth wheel, I've just heard counsel say that they thought  
 (16) it was very important to address with the Bureau how this  
 (17) agreement dovetailed with this proceeding. And I'm having  
 (18) great difficulty understanding why in light of that felt  
 (19) necessity they didn't also feel the necessity to report the  
 (20) consummation of the transaction or the details of the  
 (21) transaction on the record in this proceeding.  
 (22) JUDGE SIPPEL: Well, I don't need to get into  
 (23) that. I mean, I've got the pleadings. I know what the  
 (24) position that - that Liberty has taken with respect to  
 (25) that. It - I don't feel - I don't feel - I mean, I don't

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(1) feel good about it at all, not disclosing something like  
 (2) this in the middle of a proceeding when proceeding is going  
 (3) on. But you know, the views have been expressed in the  
 (4) pleadings and there's no sense in my trying to put somebody  
 (5) on the spot with anything. What's been done has been done  
 (6) Mr. Beckner?  
 (7) MR. BECKNER: Your Honor, I really don't want to  
 (8) get involved at this time at least in cross examining by  
 (9) anybody. I just want to direct your attention to page 3 of  
 (10) the Wireless Bureau's paper filed on May 14, paragraph  
 (11) number 4 which says, "At no time during the discussing  
 (12) between the staff and Liberty and counsel for the unnamed  
 (13) source did the Bureau ever voice an opinion as to whether  
 (14) any contemplated transactions could take place without prior  
 (15) Commission approval or notification. To the contrary, the  
 (16) nature and level of the discussion was such that there was  
 (17) no information specific enough for the Bureau" - I'm sorry,  
 (18) "for which the Bureau to consider let alone acquiesce in or  
 (19) approve."  
 (20) That sounds to me somewhat different than what  
 (21) we're hearing now. I mean, I'm not going to repeat our  
 (22) position that's in the papers about this whole issue of the  
 (23) meeting. But I'm not sure that - that there isn't in fact  
 (24) a material disagreement between the Bureau and Liberty about  
 (25) what was said at the meeting or on this particular issue.

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(1) because what the Bureau is saying, at least in this paper as  
 (2) I read it, is that the Bureau never said well, that's okay.  
 (3) JUDGE SIPPEL: Well, let's hear. Go ahead.  
 (4) MR. WEBBER: Your Honor, that is correct and I  
 (5) don't think our position has changed today at all. I - our  
 (6) discussion about the meeting today has never gone to the  
 (7) level where we told Liberty or this unnamed party that they  
 (8) had a stamp of approval. And we still maintain that such a  
 (9) was never given to them. They were never given a blessing  
 (10) mainly because the details of their description were kept  
 (11) cryptic enough, or at least unspecific enough that we  
 (12) weren't able to get to the point to say you have our  
 (13) blessing, go to it.  
 (14) MR. PETTIT: Your Honor, I think the level of  
 (15) detail, in fact, explains that. If I may get back to your  
 (16) concern about the nondisclosure of this arrangement about  
 (17) which I assume you bring up the 1.65 question. That  
 (18) requires disclosure of information in the course of a  
 (19) proceeding such as this which is of decisional significance  
 (20) is the phrase that's used in the - in the rule. It is our  
 (21) position that there is nothing about the question of whether  
 (22) Liberty owns or does not own a programming service which is  
 (23) of decisional significance to any of the issues which have  
 (24) been designated in this hearing. It simply is irrelevant to  
 (25) the issues.

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(1) JUDGE SIPPEL: Well, I - you know, I hear your  
 (2) argument and I've read your argument. I'm not going to let  
 (3) that - I don't want to let that question control what's  
 (4) going on here today or let it control what we do with these  
 (5) issues. The main focus has got to be on this control  
 (6) question. But I'm certainly not going to buy - to lead you  
 (7) with a false impression that I don't think that this  
 (8) information was not significant enough to report to the  
 (9) Commission. That's one of the reasons why I'm spending all  
 (10) this time wanting to know how much was told to them back in  
 (11) January.  
 (12) Even though it was an informal 1.65 filing, at  
 (13) least there was some information that was given to the  
 (14) Commission about this. But I'm not suggesting either that  
 (15) that satisfies 1.65. You know, I was very surprised when  
 (16) this issue was raised. If all this had gone on since the  
 (17) first of this year and that the person or the attorney  
 (18) didn't know about. But well, I don't want to get into that  
 (19) because it's - we're going to run out of time and people  
 (20) are going to have to leave and I'm not going to be finished.  
 (21) How much does Freedom owe under the asset  
 (22) agreement at this time? I mean how much is due, how much is  
 (23) under the purchase agreement?  
 (24) MS. KIDDOO: I think it's 15 million dollars.  
 (25) JUDGE SIPPEL: Fifteen million dollars? Okay.

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(1) And the structure of the agreement seems to open the door,  
 (2) and I know this has been raised I think by Mr. Beckner -  
 (3) seems to open the door for Freedom to acquire - eventually  
 (4) to acquire control over the whole operation. I mean,  
 (5) they'll end up with all the facilities at some point. It  
 (6) doesn't say that's going to happen, but it certainly is  
 (7) structured in such a way to allow that to happen without any  
 (8) difficulty.  
 (9) MR. PETTIT: I'd have to say that is one  
 (10) possibility, Your Honor. It's also a possibility as you  
 (11) know from the agreement that Freedom will build a wireless,  
 (12) with the Commission's approval of course, system and that  
 (13) that sort of transfer would now take place.  
 (14) JUDGE SIPPEL: Right. I understand. All of this  
 (15) is said in conjunction - I mean, there's all kinds of  
 (16) language in that agreement that this is going to be done in  
 (17) accordance with Commission practice, policy.  
 (18) MR. PETTIT: We might add, Your Honor, at that  
 (19) juncture, of course, Bartholdi will continue to have those  
 (20) licenses. What will be done with them, in fact, I don't  
 (21) know. They seem like they'd have to be used for video.  
 (22) JUDGE SIPPEL: There wouldn't be an effort to  
 (23) transfer them?  
 (24) MR. PETTIT: There may be an effort to transfer  
 (25) them. They may be turned in to the Commission and that's a

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(1) possibility, too, or they may be operated in some other  
 (2) manner assuming there would be - or Bartholdi holds them.  
 (3) JUDGE SIPPEL: How old are the Milsteins?  
 (4) MR. BECKNER: Mid-forties, Your Honor.  
 (5) JUDGE SIPPEL: Now, what about the contracts in  
 (6) progress with the subscribers? I take it all of those are  
 (7) now the assets of Freedom?  
 (8) MS. KIDDOO: That's correct, Your Honor. And  
 (9) there are some transition months that were entered prior to  
 (10) March 6th.  
 (11) JUDGE SIPPEL: Do the subscribers have to agree to that?  
 (12) that? I mean, do they - they don't - they just are told -  
 (13) - do they get a little card or something that says that now  
 (14) you're going to be sending your bills to and your things to  
 (15) Freedom?  
 (16) MR. SPITZER: Your Honor, I believe that it varied  
 (17) contract-by-contract. There were some contracts that  
 (18) required that there be notification. There were some where  
 (19) assignment was permitted without any action on the part of  
 (20) the dodum (phonetic). It varied dodum (phonetic) by dodum  
 (21) (phonetic). There is as you may be aware a separate  
 (22) contract by and large between Liberty and each of the multi-  
 (23) dwell units which it was served by Liberty.  
 (24) JUDGE SIPPEL: So the contract is just with the  
 (25) building only, not with the individual -

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(1) MR. SPITZER: That's right. It's either with a  
 (2) co-op board or a condominium or with an individual owner who  
 (3) owns a rental structure. So it would vary.  
 (4) JUDGE SIPPEL: Have all those been completed -  
 (5) mean, well, has it - when did that transition occur? That  
 (6) is, when were the actual payments told to be made to, where  
 (7) would it be, Freedom down in Princeton, New Jersey as  
 (8) opposed to being sent over to Madison Avenue?  
 (9) MS. KIDDOO: Well, the - as you know, the name  
 (10) Liberty continued to be in effect -  
 (11) JUDGE SIPPEL: Yes.  
 (12) MS. KIDDOO: - because it was purchased by  
 (13) Freedom. So the bills still say Liberty. And I think  
 (14) that - you know, that the payments - in fact, the address  
 (15) to which they are sent, I don't know that that's - it's a  
 (16) billing company I think. I don't know the details of that,  
 (17) but it seems to me that it was virtually transparent to the  
 (18) end-users.  
 (19) JUDGE SIPPEL: Whose bank account do the payments  
 (20) go into? Freedom's?  
 (21) MS. KIDDOO: Freedom's, RCN's.  
 (22) JUDGE SIPPEL: All right. But that's -  
 (23) MR. PETTIT: Which we think is in New Jersey.  
 (24) MS. KIDDOO: Which is in Princeton.  
 (25) JUDGE SIPPEL: It's in Princeton, New Jersey.

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(1) MS. KIDDOO: Yes.  
 (2) JUDGE SIPPEL: So somebody at that Madison Avenue  
 (3) address or some address, the old Liberty address that's  
 (4) receiving those and sending them down -  
 (5) MS. KIDDOO: I'm not even sure they're going to  
 (6) that address, Your Honor. I seem to recall a billing -  
 (7) there may be a billing company that's involved that would be  
 (8) the address to which -  
 (9) JUDGE SIPPEL: Would that be Mr. - this isn't Mr.  
 (10) - the Milford Management? Does Milford Management play  
 (11) into that?  
 (12) MS. KIDDOO: No.  
 (13) JUDGE SIPPEL: All right. Now, when did that  
 (14) start happening? Now, when did the money actually start  
 (15) hitting the Freedom account?  
 (16) MS. KIDDOO: As of the date of closing.  
 (17) JUDGE SIPPEL: Well, we've got several closing  
 (18) dates here.  
 (19) MS. KIDDOO: March 6th, Your Honor.  
 (20) JUDGE SIPPEL: March 6th.  
 (21) MS. KIDDOO: The date of closing.  
 (22) JUDGE SIPPEL: So on or shortly after March 6th.  
 (23) Bartholdi ceased to receive money.  
 (24) MS. KIDDOO: If I'm correct, it's the 5th.  
 (25) JUDGE SIPPEL: The 5th, all right. March 5th.

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(1) Well, I thought that March 6th was the date that the deal  
 (2) was closed, but -  
 (3) MS. KIDDOO: That's been my recollection, but I -  
 (4) JUDGE SIPPEL: For purposes of my question, it  
 (5) really doesn't make any difference.  
 (6) MS. KIDDOO: As of closing, Your Honor, the right  
 (7) to any revenues received from those subscribers was  
 (8) RCN/Freedom's.  
 (9) JUDGE SIPPEL: All right. Now, after the closing  
 (10) then, after March 5th -  
 (11) MS. KIDDOO: Your Honor, you know that there are  
 (12) bills that are out there that payments are constantly coming  
 (13) in on a daily basis so that what is relevant it seems to me  
 (14) is who is entitled to the revenues as of that closing date,  
 (15) and that is Freedom. So, you know, where the checks went  
 (16) needed to be sorted out because you can't change a bill  
 (17) that's already out to a subscriber. So the revenues were  
 (18) Freedom revenues as of that closing date.  
 (19) JUDGE SIPPEL: But what I'm trying to get at is  
 (20) who was working for who at the time that these payments were  
 (21) being - were being made and were being handled? Were these  
 (22) Freedom employees or were these Bartholdi employees on  
 (23) behalf of Freedom or how was that -  
 (24) MS. KIDDOO: Employees for what purpose, Your  
 (25) Honor?

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- (1) JUDGE SIPPEL: For handling - well, Mr. Spitzer  
 (2) maybe gave the easy answer to that. That is that they have  
 (3) a management, somebody unrelated to the two of them who is  
 (4) doing this on a sort of contract basis. Is that right?  
 (5) Like -  
 (6) MR. SPITZER: At one point, I think something was  
 (7) said to me that indicated that was the case. But I do not  
 (8) know - do not speak of personal knowledge on that. I'm a  
 (9) Time Warner subscriber, unfortunately, I think I send my  
 (10) checks to somebody other than Time Warner.  
 (11) MS. KIDDOO: Your Honor, in any event, whoever is  
 (12) handling the billing is not handling microwave license  
 (13) facilities, maintenance or operation.  
 (14) JUDGE SIPPEL: Right. I understand that. Now,  
 (15) what else was done with respect at the time of the closing,  
 (16) now what else was done in terms of who was working for who,  
 (17) in terms of the working - let's say in terms of the  
 (18) transmission work? Were these still being done by the  
 (19) employees of Bartholdi or were they the employees of  
 (20) Freedom?  
 (21) MS. KIDDOO: For a limited period of time, they  
 (22) were still the employees of Bartholdi. I think that Freedom  
 (23) retained those - RCN retained those employees on the 12th  
 (24) of March. So there was a couple of days between closing and  
 (25) when the actual employees were transferred, basically having

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- (1) to do with getting paperwork done and that sort of thing.  
 (2) JUDGE SIPPEL: All right. Now, did those  
 (3) employees - did they have to pack up and move someplace or  
 (4) did they just stay in place where they were?  
 (5) MS. KIDDOO: Some did. Some stayed in place under  
 (6) lease arrangements, yes.  
 (7) MR. PETTIT: Your Honor, I think you're referring  
 (8) specifically to the two engineering contract employees, is  
 (9) that correct?  
 (10) JUDGE SIPPEL: Well, them, too. But I there's a -  
 (11) - I think there was a list of something like in excess of a  
 (12) hundred that were shown to me. And I think the bottom line  
 (13) was is that Bartholdi ended up with having only 13 left or  
 (14) something.  
 (15) MS. KIDDOO: A number - a number of the employees  
 (16) moved to RCN's new offices, Freedom's new offices. The two  
 (17) employees primarily responsible for maintenance of the  
 (18) microwave facilities I think continued to reside in their  
 (19) old offices -  
 (20) MR. PETTIT: Might I add, Your Honor -  
 (21) MS. KIDDOO: - on lease spaces.  
 (22) MR. PETTIT: - Your Honor, Bartholdi continues to  
 (23) maintain an office for the two engineering contract  
 (24) employees at the Normandy which is a building where the head  
 (25) end is and the - or I'll call them the major transmitters

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- (1) for the system. It's also the building where Mr. Tenetey  
 (2) who supervises those employees on behalf of the - on behalf  
 (3) of Bartholdi in fact lives and works. That building is, in  
 (4) fact, owned by the - by the Milsteins.  
 (5) JUDGE SIPPEL: Owned by the Milsteins, yes.  
 (6) MR. PETTIT: Yes, that's right.  
 (7) JUDGE SIPPEL: That's not the Madison Avenue  
 (8) address, though, is it?  
 (9) MR. SPITZER: It's Ninety-fifth Street, Your  
 (10) Honor.  
 (11) JUDGE SIPPEL: Ninety-fifth Street, okay. And  
 (12) Milford Management is in that building?  
 (13) MR. SPITZER: Yes, I don't know technically - I  
 (14) mean, that's where Mr. Tenetey lives and works. Now,  
 (15) whether Milford Management has its corporate - formal  
 (16) corporate office there, I just don't know.  
 (17) JUDGE SIPPEL: Now, with respect to the duties  
 (18) that are being performed under the subcontract, I take it  
 (19) since it's an as-of date, that your position would be that  
 (20) those duties were undertaken shortly after the closing.  
 (21) MS. KIDDOO: They were undertaken as of March  
 (22) 12th. The actual written agreement was not entered into  
 (23) until May. However, billing has been sent to Bartholdi  
 (24) dating back to March 12th  
 (25) JUDGE SIPPEL: Okay. Now, who negotiated the

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- (1) terms of that subcontract agreement? Who were the  
 (2) principals involved in doing that? Mr. Price?  
 (3) MS. KIDDOO: The individuals?  
 (4) MR. PETTIT: Negotiating the subcontractor  
 (5) agreement? We would have to get that to you. I assume Mr.  
 (6) Price, Your Honor.  
 (7) JUDGE SIPPEL: And how about on the Freedom side?  
 (8) MR. PETTIT: We'll certainly provide that to you.  
 (9) JUDGE SIPPEL: Mr. Rosenblum?  
 (10) MS. KIDDOO: Mr. Rosenblum, Mr. Moore, Mr.  
 (11) Gottdenker.  
 (12) JUDGE SIPPEL: Well, if they were doing the work  
 (13) on the 12th and these were the - these principals were -  
 (14) these were all principals that are in town, right? I mean,  
 (15) isn't that - why did you take so long to put that together?  
 (16) MS. KIDDOO: Your Honor, as of - as of March  
 (17) 12th, there was an agreement as to the fact that these  
 (18) employees would be subcontracting services to Bartholdi.  
 (19) And there was an agreement as to the rate that would be paid  
 (20) for their services and the terms under which they would  
 (21) provide them. However, you can well imagine that with a  
 (22) transition of the magnitude that was going on here in terms  
 (23) of the new ownership structure coming in, our - my client  
 (24) was very much engaged in transitioning services so that  
 (25) customers could be notified so that billing could be changed

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- (1) where necessary so that - all of the things that needed to  
 (2) be done.  
 (3) And quite frankly, you know, this is something  
 (4) that was one of the things that needed to be done. And it  
 (5) got done. But it did not get done immediately.  
 (6) JUDGE SIPPEL: March to May is a pretty long time  
 (7) for a - I mean, a document is not - it doesn't come up to  
 (8) the complexity certainly of the asset purchase agreement it  
 (9) would seem to me. You may not agree but -  
 (10) MR. SPITZER: No, no. I'm trying to - I think  
 (11) what Ms. Kiddoo is saying really captures the sense that  
 (12) there was a very complicated transition going on here.  
 (13) There were lawyers who had worked strenuously to close the  
 (14) transaction who then have a myriad of other things that  
 (15) needed to be done. Some of the lawyers at this table were  
 (16) involved negotiating the subcontract agreement.  
 (17) And even though there may have been a meeting of  
 (18) the minds among the principals, back on, you know, March  
 (19) 12th about what the general terms of that contract would be,  
 (20) there were drafts of the subcontract agreement going back  
 (21) and forth over the next couple of weeks and, you know, a  
 (22) hundred different issues in terms of making sure that this  
 (23) very complicated transaction got handled properly over that  
 (24) time period. So I'm not at all surprised that it took a few  
 (25) more weeks to get, you know, a formalization of the

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- (1) understanding that had been entered.  
 (2) MR. PETTIT: Well, it's also a matter, Your Honor,  
 (3) of the fact that there was an understanding. It was up and  
 (4) operating. The intention obviously was to put that in  
 (5) writing at some point. And as Mr. Spitzer said, it was -  
 (6) begun to be negotiated when in fact it was working. -  
 (7) JUDGE SIPPEL: Well, yes, but who was in control -  
 (8) at that time? I think that's what this is all about.  
 (9) MS. KIDDOO: Bartholdi has been in control since -  
 (10) -  
 (11) JUDGE SIPPEL: Well, I know that's what you're  
 (12) arguing and I know that's what you're saying the documents  
 (13) show. But you see that there is this hiatus when they were  
 (14) operating under some kind of an understanding that they  
 (15) didn't have anything that was signed, a very specific  
 (16) document, number one. Number two is who was - how were the  
 (17) insurance companies - where was the insurable interest at  
 (18) that point? Who was - were the insurance companies being  
 (19) kept apprised of this?  
 (20) MS. KIDDOO: The personal health insurance of the  
 (21) employees or -  
 (22) JUDGE SIPPEL: No, no, no. Well, whatever you  
 (23) have in terms of your liability insurance and, you know,  
 (24) there must be insurable interest in terms of the services  
 (25) that are being provided

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(1) MR. PETTIT: This is - I'm sorry, Your Honor -  
 (2) insurance on the - these two individuals?  
 (3) JUDGE SIPPEL: On the - insurance on the assets.  
 (4) insurance on the - you say all these assets were  
 (5) transferred. Was there insurance on those assets?  
 (6) MS. KIDDOO: On the subscriber base and the name  
 (7) Liberty and those kinds of things, I think so.  
 (8) JUDGE SIPPEL: No. Okay, then on those. But were  
 (9) there other assets that were transferred? Were there hard  
 (10) assets or were these all intellectual assets?  
 (11) MS. KIDDOO: There was probably some inventory,  
 (12) maybe trucks, things like that. I'm sure that transferred.  
 (13) Your Honor, one of the things that - you know, that  
 (14) happened here, when the agreements were signed on February  
 (15) 20th, the parties contemplated that there would need to be a  
 (16) Hart-Scott-Rodino filing for the transaction. That would  
 (17) have given us 30 days to get some of these details done.  
 (18) There turned out to be no Hart-Scott-Rodino filing  
 (19) necessary.  
 (20) As a result, we closed the deal much more quickly  
 (21) than was originally contemplated. That meant that some of  
 (22) these details - for example, the fact the employees were  
 (23) not terminated by Bartholdi and hired by Freedom until March  
 (24) 12th would seem to - you know, would seem to be a little  
 (25) inconsistent with the contract. However, the fact of the

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(1) matter is the parties realized that they couldn't get it all  
 (2) done overnight and get all the paperwork done, all these new  
 (3) employees on the insurance plans and everything else. There  
 (4) needed to be some time.  
 (5) So they agreed between themselves that that could  
 (6) wait for until the 12th. I mean, there were lots of details  
 (7) because of the speed to which this transaction ultimately  
 (8) closed after the agreements were reached that were worked  
 (9) out between the parties. And the subcontractor agreement is  
 (10) one of those details that took some time. And for whatever  
 (11) reason, there were other things going on. And review of  
 (12) drafts that went back and forth took extra days in between  
 (13) drafts.  
 (14) MR. PETTIT: Your Honor, if I might speak to the  
 (15) question of control during what you described as the hiatus  
 (16) before the completion of this agreement. Mr. Price's  
 (17) affidavit I believe speaks to that. He describes these  
 (18) employees as being supervised by and required to report to  
 (19) John Tenetey and to Mr. Price, as well. And he says that  
 (20) they remained at all times ultimately responsible for the  
 (21) operation; that is, Mr. Tenetey and Mr. Price were  
 (22) responsible for the operations.  
 (23) He goes on to say that consistent with terms of  
 (24) the agreements between Bartholdi and Freedom, "Bartholdi",  
 (25) and I will quote, "continues to own and control the

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(1) transmission and reception equipment used to provide  
 (2) microwave transmission services."  
 (3) JUDGE SIPPEL: Well, no, the conclusions on the  
 (4) affidavits are very clear. What I'm trying to do is get -  
 (5) is just - these are just questions that popped into my mind  
 (6) as I'm reading these documents.  
 (7) MR. WEBBER: Yes, Your Honor, the Bureau I guess  
 (8) mirrors your questions or echoes them. The conclusions  
 (9) reached by Mr. Price in his declaration we hardly find the  
 (10) peremptory of the issues. As the Commission learned in  
 (11) the LeStar proceeding, you can have declarations from people  
 (12) saying that they're doing certain things or that they will  
 (13) be doing certain things where the actuality is the complete  
 (14) opposite. And therefore, his declaration may be helpful,  
 (15) but it's far from determinative. And the Bureau is a little  
 (16) bit, I don't know, maybe dismayed at what appears to be a  
 (17) cavalier attitude expressed by Ms. Kiddoo of Freedom by -  
 (18) apparently considering control just being a detail that they  
 (19) can reach later.  
 (20) MS. KIDDOO: I think that's somewhat of a stretch  
 (21) of what I was saying, Your Honor. The fact of the matter is  
 (22) that control was very important and control has been and  
 (23) always will be so long as Bartholdi is providing microwave  
 (24) transmission facilities. Under its transmission services  
 (25) agreement, control will reside with Bartholdi. It has

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(1) always resided with Bartholdi.  
 (2) MR. WEBBER: I'm sorry. I did misspeak. I mean  
 (3) that even something which really is as important as the  
 (4) subcontractor agreement which spells out what control will  
 (5) be is something that's just a detail because it - the  
 (6) Bureau certainly considers it far more -  
 (7) MS. KIDDOO: Your Honor, both parties were well  
 (8) aware at all times what control was and what obligations  
 (9) they have under the FCC's licensing rules. The fact that  
 (10) there was not a written agreement memorializing their  
 (11) understanding is not determinative of the fact that either  
 (12) company treated these things in any kind of cavalier manner  
 (13) or didn't - or disregarded them.  
 (14) JUDGE SIPPEL: Well, this is what I want to avoid  
 (15) the best I can. I mean, what I want to avoid is - I don't  
 (16) want to get antagonisms voiced here this morning because we  
 (17) don't have time for it. But it just seems to me if - to  
 (18) the extent that I've had exposure to Hart-Scott-Rodino work,  
 (19) that if you were thinking of Hart-Scott-Rodino, you  
 (20) certainly wouldn't have filed something with the Justice  
 (21) Department or the Federal Trade Commission without having  
 (22) that subcontract nailed down. I don't think that - you're  
 (23) saying no. You're saying they wouldn't care about that?  
 (24) MR. SPITZER: Your Honor, I don't think that was  
 (25) an issue. And in fact, when we did file with DOJ and the

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(1) FTC, as it turns out, they rejected our filing because there  
 (2) were certain thresholds that were not satisfied in terms of  
 (3) revenue and asset valuation, et cetera. But be that as it  
 (4) may, the filings were made with DOJ and the FTC, and then we  
 (5) were told that upon their review that there was no necessity  
 (6) to file.  
 (7) JUDGE SIPPEL: Well, that's as far as they're  
 (8) going to go if you don't meet the threshold. That's as far  
 (9) as they're going to go. But I'm saying that if you actually  
 (10) - but you said that you were gearing up to file with them.  
 (11) MR. SPITZER: The filings were made and prepared  
 (12) in their entirety.  
 (13) JUDGE SIPPEL: Well, I think that -  
 (14) MR. SPITZER: Well, I can only say, Your Honor,  
 (15) that upon the advice of counsel who have known intimately of  
 (16) the inner workings of both the FTC and the DOJ anti-trust  
 (17) division, I don't think there was any ambiguity about the  
 (18) propriety of those filings and the fact that they were  
 (19) complete and ready to - would have given very prompt  
 (20) approval.  
 (21) JUDGE SIPPEL: All right. I hear you. Okay.  
 (22) As - there's a Mr. Bruce Godfrey of Freedom that appears on  
 (23) one of the application forms that was attached to one of the  
 (24) pleadings. What is - what is - does he have any  
 (25) connection with the - with the - with any of these

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(1) licenses that are the subject of this proceeding or any of  
 (2) the facilities for which these are -  
 (3) MS. KIDDOO: No, Mr. Godfrey - I believe his  
 (4) title is chief financial officer, although I'm not - it's  
 (5) something along those lines. But he does not have any  
 (6) duties or any responsibilities at all with respect to the  
 (7) licenses held by Bartholdi for the facilities. Now, just to  
 (8) be clear, the licenses applications which were filed by  
 (9) Freedom will share some transmitter sights, I think maybe  
 (10) even one receive sight under the - in compliance with the  
 (11) Commission's rules with some Bartholdi sights.  
 (12) The fact is that both companies will have access  
 (13) to those transmitters pursuant to the Commission's rules.  
 (14) So in that sense, I suppose Mr. Godfrey if that's what your  
 (15) question was aiming at.  
 (16) JUDGE SIPPEL: Well, what I'm trying to do - is  
 (17) there a parallel between what Mr. Godfrey does and what Mr.  
 (18) Price does? I mean, Mr. Price does certain things with  
 (19) respect to the Bartholdi assets. Am I framing that question  
 (20) correctly?  
 (21) MS. KIDDOO: Yes, Mr. Godfrey is probably not the  
 (22) counterpart in the RCN organization to Mr. Price in that  
 (23) respect. I think that Mr. Price's counterpart would be  
 (24) another gentleman by the name of Dick Sayre.  
 (25) JUDGE SIPPEL: How do you spell that name?

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- (1) MS. KIDDOO: S-A-Y-R-E, I believe.  
 (2) JUDGE SIPPEL: Thank you. And David McCourt of C-TEC, does he play any role in terms of these assets that -  
 (3) MS. KIDDOO: Well, in terms of this, he is the  
 (4) president of the company or the - I don't know. With  
 (5) respect to Freedom, he may actually just be a board member  
 (6) I don't think he's actually the president.  
 (7) JUDGE SIPPEL: Well, what - does he have any  
 (8) contacts with Mr. Price? I mean, does RCN - does C-TEC tie  
 (9) in with RCN? It does, doesn't it?  
 (10) MS. KIDDOO: Yes.  
 (11) JUDGE SIPPEL: And RCN now has an - is it RCN  
 (12) that has - RCN has - let me back up on this part.  
 (13) Bartholdi has the interest in Freedom, right? The 19.9  
 (14) percent?  
 (15) MS. KIDDOO: They have 19.9 percent interest. RCN  
 (16) holds the other 80.1, if my math is correct.  
 (17) JUDGE SIPPEL: Now, let me rephrase my question  
 (18) with respect to David McCourt. Does he play any - does he  
 (19) share any responsibilities with Mr. Price for any of the  
 (20) assets that are the subject of this litigation or this case?  
 (21) MS. KIDDOO: No, not at all.  
 (22) JUDGE SIPPEL: They've got - that's separate and  
 (23) across?  
 (24) MS. KIDDOO: Neither RCN nor Freedom nor C-TEC

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- (1) have any interest whatsoever in Bartholdi.  
 (2) JUDGE SIPPEL: I know they don't have a - well,  
 (3) what I'm saying is they don't play any role at all in terms  
 (4) of what's being done?  
 (5) MS. KIDDOO: Other than the fact that some of  
 (6) their employees are subcontracting to Bartholdi to maintain  
 (7) the system.  
 (8) JUDGE SIPPEL: That brings us back to the  
 (9) subcontract agreement.  
 (10) MS. KIDDOO: That's the only connection.  
 (11) JUDGE SIPPEL: And what about the - what is the -  
 (12) - let me go back again to these interests and my question  
 (13) about the insurable interest although I don't want to focus  
 (14) on the insurable interest any more. This 80 percent  
 (15) interest that was reported in the 10-K and I guess it was -  
 (16) well, let me just stay with the 10-Ks - that paraphrasing  
 (17) now, but it was reported there that - that the Freedom  
 (18) group, I'll say, was acquiring an 80 percent interest in  
 (19) Liberty - then Liberty Cable. What was -  
 (20) MS. KIDDOO: That's not correct.  
 (21) JUDGE SIPPEL: That's not correct.  
 (22) MS. KIDDOO: No. That was the press'  
 (23) interpretation loosely of what the 10-Ks said.  
 (24) JUDGE SIPPEL: No, I read the 10-Ks. The 10-Ks  
 (25) said that in two places.

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- (1) MS. KIDDOO: Well, part -  
 (2) JUDGE SIPPEL: I mean the excerpts for the 10-Ks  
 (3) that were attached to Mr. Beckner's motion.  
 (4) MS. KIDDOO: Well, remember - remember the name  
 (5) issue in terms of the transfer of that asset. It was  
 (6) certainly not the transaction. The transaction was not an  
 (7) acquisition of any interest in Bartholdi - the company that  
 (8) is now Bartholdi Cable that was Liberty Cable. There was no  
 (9) acquisition of stock or -  
 (10) JUDGE SIPPEL: It didn't say it was stock. It  
 (11) didn't say. That's what I was curious about. It didn't say  
 (12) what it was.  
 (13) MS. KIDDOO: It was in assets. We purchased -  
 (14) JUDGE SIPPEL: Eighty percent of their assets?  
 (15) MS. KIDDOO: - 80 percent - well, no. Mr.  
 (16) Martin may be able to help out. He understands these  
 (17) transactions better than I do.  
 (18) MR. MARTIN: There's a new entity formed, Freedom  
 (19) New York, L.L.C., that at the closing of the transaction  
 (20) paid to the cable company which changed it's name to  
 (21) Bartholdi - paid that entity 25 million dollars; gave them  
 (22) a note for 15 million dollars which is the amount that was  
 (23) unpaid for the assets. And it also issued to I think it's  
 (24) Liberty Cable Company, now Bartholdi, a 20 percent interest  
 (25) of the new company all this consideration for the purchase

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- (1) by Freedom New York, L.L.C. of the assets of Liberty Cable  
 (2) Company as defined by asset - not the totality of those  
 (3) assets, those assets defined in the asset purchase  
 (4) agreement.  
 (5) JUDGE SIPPEL: Well, that's what I - that's what  
 (6) struck my curiosity. How did they come up with a figure of  
 (7) 80 percent in the 10-K?  
 (8) MS. KIDDOO: Do you have a cite to that because  
 (9) I'm not seeing the language?  
 (10) JUDGE SIPPEL: I have a copy - yes, I didn't  
 (11) bring my copy in the courtroom with me, but I remember  
 (12) reading it.  
 (13) MR. SPITZER: I think 80 percent roughly - 80  
 (14) percent equates to what happened at the end of the day where  
 (15) RCN corporation ends up owning roughly 80 percent of the  
 (16) buyer and Liberty Cable Company owns 20 percent of the  
 (17) buyer.  
 (18) MS. KIDDOO: Yes. What it says, Your Honor, is  
 (19) that RCN enters into an asset purchase agreement with  
 (20) Liberty Cable to purchase an 80 percent interest in certain  
 (21) private cable systems in New York. In other words, the  
 (22) system was purchased and all of the assets that were covered  
 (23) by the asset purchase agreement were moved into Freedom  
 (24) York. And what RCN purchased was an 80 percent interest in  
 (25) Freedom New York and the sellers purchased a 19.9 percent

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- (1) interest in Freedom New York.  
 (2) So what happened was all of the assets got  
 (3) transferred into Freedom New York. And RCN, Peter Cuit  
 (4) (phonetic) and Sons purchased was an 80.1 percent interest  
 (5) in that company. So in other words, what it says is an 80  
 (6) percent interest in certain private cable systems. The  
 (7) systems were moved into Freedom New York and we purchased  
 (8) 80.1 percent of that. The Bartholdi principals purchased  
 (9) 19.9 percent interest in that is what happened.  
 (10) JUDGE SIPPEL: All right. I hear you. And  
 (11) they've got an equity interest of 19.9 percent, right?  
 (12) MS. KIDDOO: That's right. In Freedom New York.  
 (13) JUDGE SIPPEL: But the position is obviously that  
 (14) even though there was - so they control - I mean, they  
 (15) control legally in the sense of being a shareholder or  
 (16) having a controlled share of the stock, they have a  
 (17) controlling interest of 20 percent over and above actual  
 (18) control, over and above operational control, right?  
 (19) MS. KIDDOO: No, no. No, no.  
 (20) JUDGE SIPPEL: No?  
 (21) MR. SPITZER: The control group that is at issue I  
 (22) believe, Your Honor, relates to Bartholdi. Bartholdi they  
 (23) owned - the Milsteins in entirety. The entity which is  
 (24) essentially the 80/20 split is the new entity, Freedom.  
 (25) JUDGE SIPPEL: Right.

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- (1) MR. SPITZER: And that doesn't hold the licenses.  
 (2) The licenses -  
 (3) MS. KIDDOO: Are 100 percent.  
 (4) MR. SPITZER: - are 100 percent in Bartholdi  
 (5) which is owned 100 percent by the Milsteins.  
 (6) JUDGE SIPPEL: No, I do understand that. But  
 (7) we're talking about the assets, right? Isn't this what the  
 (8) disclosure says? Is that 80 percent of the assets are not  
 (9) with Freedom?  
 (10) MR. SPITZER: Eighty percent of those assets that  
 (11) are the subject of the asset purchase agreement.  
 (12) MS. KIDDOO: Yes, not - not -  
 (13) MR. SPITZER: But that's -  
 (14) JUDGE SIPPEL: Now, what other assets are there  
 (15) with respect to the license and what kind of - these are  
 (16) going to be the transmitters and the wiring to the  
 (17) transmitters going into the buildings?  
 (18) MS. KIDDOO: Some of the wiring but probably not  
 (19) all of it. I mean, electrical wiring, yes. The wiring that  
 (20) goes from the output point, say, of a receive site and down  
 (21) into serve customers within the building is not microwave  
 (22) it's coaxial cable. And that asset was purchased by  
 (23) Freedom.  
 (24) JUDGE SIPPEL: All right.  
 (25) MS. KIDDOO: But that's not part of the microwave



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- (1) network.  
 (2) JUDGE SIPPEL: So if we just said hypothetically,  
 (3) if - if Freedom didn't like what Bartholdi was doing in  
 (4) some context of its transmission and they got in some kind  
 (5) of a big argument, I guess they could just say well, we're  
 (6) not going - Freedom could say we're not going to let you -  
 (7) we're not going to let you use our wiring in the buildings  
 (8) we purchased from you. Business-wise that may be a silly  
 (9) question, but just a more practical -  
 (10) MS. KIDDOO: But they don't need the wiring in the  
 (11) building.  
 (12) JUDGE SIPPEL: They don't need it.  
 (13) MS. KIDDOO: Not to provide microwave services.  
 (14) JUDGE SIPPEL: Then what did they buy it for.  
 (15) MS. KIDDOO: I'm talking about Bartholdi doesn't  
 (16) need it -  
 (17) MR. SPITZER: Bartholdi doesn't need it.  
 (18) MS. KIDDOO: - to by licensed microwave  
 (19) facilities.  
 (20) MR. SPITZER: Freedom may need it -  
 (21) MS. KIDDOO: Freedom needs it -  
 (22) MR. SPITZER: - to provide subscriber service.  
 (23) JUDGE SIPPEL: Right, okay.  
 (24) MR. SPITZER: But Bartholdi doesn't need it to  
 (25) provide the microwave service.

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- (1) JUDGE SIPPEL: I see. Well, I - I would say that  
 (2) pretty much covers it. I have other questions that I have  
 (3) written down, but I think that they've been addressed in  
 (4) other contexts of the discussion here. I want to give some  
 (5) more thought to the Bureau's concern, but you certainly -  
 (6) well, I'm not saying concern, but the Bureau's question with  
 (7) respect to going - to running a parallel investigation on  
 (8) this issue rather than adding the issue. But I'm just going  
 (9) to have to go back and work with your pleadings. This has  
 (10) been very helpful to me.  
 (11) Is there anything that - I mean, I did express  
 (12) this concern about the 1.65 disclosure and I mean, I'm not  
 (13) going to try and hide it. I think that - I think that  
 (14) companies or registrants or licensees that conduct business  
 (15) with the Commission, when they've got a point - when  
 (16) they've got the language of a 1.65 staring them - staring  
 (17) down at them have an obligation to take that a little bit  
 (18) more seriously.  
 (19) MS. KIDDOO: Your Honor, if I could just - I did  
 (20) not comment on that whole colloquy about that issue because  
 (21) frankly, as a non-party to this proceeding I don't see any  
 (22) possible way that Freedom New York could have had a Section  
 (23) 1.65 obligation to report anything to this proceeding. To  
 (24) the extent that - however, I would point out that to the  
 (25) extent that that is an issue that is of concern and Your

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- (1) Honor feels that - that it rises the level of a question  
 (2) that you'd like to address in this proceeding, it's a very  
 (3) narrow issue as to whether or not a Section 1.65 amendment  
 (4) or filing should have been made.  
 (5) It certainly doesn't involve any real party in  
 (6) interest question, and frankly doesn't involve Freedom New  
 (7) York whatsoever. And I just wanted to point that out, that  
 (8) that's a very narrow technical compliance issue as opposed  
 (9) to a real party in interest issue designated in this  
 (10) proceeding that would involve the transaction.  
 (11) JUDGE SIPPEL: Well, I think I - I think I made  
 (12) that clear when I indicated my displeasure; that the issue  
 (13) we're here to talk about today, the big issue is the control  
 (14) issue. And I'm not going to get far afield with the 1.65  
 (15) concern now. But I - it - I'm just going to give  
 (16) everybody one more chance now. Is there anything - you  
 (17) know, on a very, very narrow specific fact basis that you  
 (18) want to bring to our attention at this time, Mr. Beckner, or  
 (19) bring to my attention?  
 (20) MR. BECKNER: I don't think that I have.  
 (21) Previously, there was one I guess disagreement that may be  
 (22) important. I want to make sure that you understand that  
 (23) this 15 million dollar hold back or note that you asked the  
 (24) Liberty/Freedom team over here, that is - that is not as I  
 (25) read this agreement - if you look at page 12 of the asset

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- (1) purchase agreement of RCN -  
 (2) JUDGE SIPPEL: Hold it just a minute. He lost his  
 (3) microphone there. Can you hear him? Go ahead.  
 (4) MR. BECKNER: I'm sorry. I'll talk louder.  
 (5) JUDGE SIPPEL: He's hearing you. That's good.  
 (6) MR. BECKNER: Okay. Good. That's not a vent in  
 (7) the common classic to the extent that we know it - you  
 (8) know, I owe Mr. Harding here some money. What that is  
 (9) essentially is on a going forward basis, why Liberty Venue  
 (10) Enterprises is going to try to get more buildings for  
 (11) Freedom New York to sell to cable service. And if they get  
 (12) more buildings and they get more customers; then they're  
 (13) going to get paid.  
 (14) And the 15 million dollars is in effect, if you  
 (15) look at this carefully, simply a cap on how much they're  
 (16) going to get paid. There's some - there's some things  
 (17) redacted from my version here, you know, numbers that says,  
 (18) "Buyer shall pay to seller", and then it's redacted, "for  
 (19) each net eligible subscriber delivered by seller or to buyer  
 (20) in excess of", and then there's a redaction, "net eligible  
 (21) subscribers."  
 (22) And the only point I want to make here is this is  
 (23) illustrating what I was saying in the beginning, is that  
 (24) these parties have a continuing relationship going forward  
 (25) and this particular provision sets that out in a sense

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- (1) that - that LIVE which I think - I think if we did an  
 (2) investigation, what we'd find is the people that are LIVE  
 (3) are also the people who are Bartholdi. It is now and will  
 (4) continue in the future to be selling the - the service to  
 (5) new buildings when that happened. And they're going to get  
 (6) paid for it out of this 15 million.  
 (7) And the relevance is that is, again, is that in  
 (8) this sort of web of relationships, at the center of it is  
 (9) Freedom New York and everybody else is existing to serve  
 (10) Freedom New York.  
 (11) JUDGE SIPPEL: You mean, it's like a performance  
 (12) contract kind of a thing with LIVE, I mean, if they -  
 (13) MR. BECKNER: Oh, yes, I mean, I think that's one  
 (14) way to describe it, is that in effect there's no obligation  
 (15) to pay them a penny unless they bring - bring in more new  
 (16) customers. And then they'll get paid a redacted amount per  
 (17) customer I gather up to a maximum of 15 million dollars.  
 (18) JUDGE SIPPEL: Is that - well, let me see, let me  
 (19) hear how Freedom -  
 (20) MR. MARTIN: That's not quite accurate there.  
 (21) There are two components. There is - what Freedom bought  
 (22) on the closing date was roughly 30,000 subscribers. In  
 (23) order - what Freedom was concerned about was issues  
 (24) relating to the licenses and making sure that when it  
 (25) acquired subscribers, there was no regulatory risk

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- (1) associated with them. There were - Freedom was also  
 (2) concerned about making sure that there was a way to serve  
 (3) the subscribers. There is a definition - a detailed  
 (4) definition of eligible subscriber and what constitutes an  
 (5) eligible subscriber. That's different from what was  
 (6) acquired.  
 (7) On the closing date, Freedom acquired subscribers.  
 (8) The pricing of the transaction was set up so that 25 million  
 (9) dollars was paid on the closing date. And that went - when  
 (10) the existing subscribers met those eligibility requirements  
 (11) that were set up in the definition for eligible subscriber,  
 (12) the money out of the 15 million dollars would be released  
 (13) incrementally until we got to the 30,000 eligible  
 (14) subscribers. That's a different calculation from LIVE and  
 (15) Bartholdi marketing in the future and being paid for their -  
 (16) a fee for their marketing services for generating new  
 (17) subscribers. It's - it's not an easy transaction to  
 (18) understand.  
 (19) MR. PETTIT: Your Honor, it's - it's -  
 (20) JUDGE SIPPEL: Mr. Pettit.  
 (21) MR. PETTIT: It's all very interesting how this 15  
 (22) million dollars works, but I guess I have a more basic  
 (23) question. I don't understand how a debt owed by a purported  
 (24) real party in interest to a licensee is somehow an  
 (25) indication that the real - that in this case Freedom

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- (1) controls Bartholdi. I still - if they really did, there  
 (2) would be no debt owed whatsoever. They'd be part and parcel  
 (3) of the same -  
 (4) JUDGE SIPPEL: Well, now, wait just a minute  
 (5) because if I'm - I mean, I'm going to check this, of  
 (6) course, in the papers. But let me ask the question this  
 (7) way, Ms. Kiddoo or - anybody can answer this whoever knows  
 (8) But what was the total? The total amount of money was what?  
 (9) Something like 60 million dollars?  
 (10) MS. KIDDOO: The total transaction I think was  
 (11) roughly 40?  
 (12) MR. MARTIN: The total consideration for the  
 (13) transaction was roughly 40 million dollars plus the 20  
 (14) percent interest.  
 (15) JUDGE SIPPEL: Oh, all right. Let me see, okay.  
 (16) That's right. So 20 - and there was 25 million dollars  
 (17) that was paid up front or paid at the time of the closing?  
 (18) MR. MARTIN: That's correct.  
 (19) JUDGE SIPPEL: So then that leaves a balance of  
 (20) about 15 million that's due.  
 (21) MR. MARTIN: That's correct.  
 (22) JUDGE SIPPEL: Now, the 15 million that's due, is  
 (23) it like the way that I do it on - you know, the way the  
 (24) bank is looking for money from me for my house purchase,  
 (25) that I pay so much a month or is there a balloon payment at

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- (1) the end?  
 (2) MR. MARTIN: Instead of your paying so much per  
 (3) month, it would be - it would be you paying if your - if  
 (4) you bought a house that needed some work and you needed  
 (5) some  
 (6) wiring done or the light bulbs didn't work. And you were  
 (7) paying when the light bulbs got fixed - you had agreed to  
 (8) pay \$100,000.00 for your house but it was in rough shape and  
 (9) you needed the windows replaced. So you paid \$50,000.00 up  
 (10) front and then you paid, you know, a thousand dollars for  
 (11) each window that was replaced.  
 (12) JUDGE SIPPEL: So, okay. So in other words - in  
 (13) other words, the purchaser is holding back 15 million  
 (14) dollars until certain features are corrected - well, until  
 (15) certain things are done and -  
 (16) MR. MARTIN: And it's not - to be clear, it's not  
 (17) Bartholdi that needs to do those things. There are  
 (18) conditions that Freedom can do for itself like making  
 (19) licenses irrelevant by hooking up buildings to a cable  
 (20) network as opposed to having the transmission services -  
 (21) having the programming delivered via microwave.  
 (22) JUDGE SIPPEL: But they're going to need -  
 (23) they're going to need the cooperation of Bartholdi to make  
 (24) this - to make this work, right, otherwise why would - you  
 (25) know, why would it be a condition for Bartholdi getting  
 (26) paid?

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- (1) MS. KIDDOO: It was part of what was negotiated.  
 (2) JUDGE SIPPEL: All right. Well, I don't want to  
 (3) argue with you. But it just - I think that Mr. Beckner has  
 (4) focused on a good point. I didn't develop it as far as I  
 (5) wanted to, but I'll go back and look at that again. Okay.  
 (6) Well, now this - while you were answering, too, it just  
 (7) jogged my recollection. You know, in the Hart-Scott-Rodino  
 (8) filings, it's actually a two state file; that is, the first  
 (9) filing that's done is a very - is a very slender file. You  
 (10) know, it's kind of almost going like a 1040EZ or something  
 (11) and that's when they determine whether or not you meet the  
 (12) standard.  
 (13) And then when they come back with a second  
 (14) request, that's when you get socked for a lot of details.  
 (15) And I would think that in anticipation of the second  
 (16) request, that something like that subcontract agreement  
 (17) would be a very significant document for the ultimate review  
 (18) by the FCC.  
 (19) MR. SPITZER: Your Honor, I think that it's  
 (20) quite - with some certitude, there is a belief that with a  
 (21) second request in a transaction of this nature, when you  
 (22) look at the sub numbers and the market shares and you do an  
 (23) anti-trust analysis of this deal, that this was something  
 (24) that was so far below the radar screen of the authorities  
 (25) that there was a degree of confidence that there would not

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- (1) be a second request. And frankly, we didn't even need the  
 (2) first threshold to get through the front door.  
 (3) JUDGE SIPPEL: Well, that's - that's -  
 (4) MR. SPITZER: So our analysis was proven correct.  
 (5) JUDGE SIPPEL: All right. In other words, the  
 (6) Hart-Scott-Rodino was really a diminutive thought by the  
 (7) time you got everything nailed down.  
 (8) MR. SPITZER: Well, it wasn't a diminutive  
 (9) thought, but it was - there was not - there was a belief  
 (10) that it would not be a serious regulatory hurdle to overcome  
 (11) given the nature of Liberty's place in the marketplace in  
 (12) New York City.  
 (13) JUDGE SIPPEL: Well, if you weren't worried about  
 (14) a second request, then it was - in terms of everything else  
 (15) that was being done, what you said is it was pretty far down  
 (16) the list.  
 (17) MR. SPITZER: Well, no. It was paramount in the  
 (18) minds of the Millsteins because it delayed by in their view  
 (19) 30 days when this transaction would close. So it was - I  
 (20) can assure you there was enormous effort put into insuring  
 (21) that the filings could be done and could be done  
 (22) expeditiously.  
 (23) MR. PETTIT: And completely.  
 (24) MR. SPITZER: That's right.  
 (25) JUDGE SIPPEL: But I'm not - well, I don't want

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- (1) to belabor this thing. But I'm not convinced that with that  
 (2) kind of a scenario under Hart-Scott-Rodino that that effort  
 (3) would have held back putting together or reducing to a full  
 (4) written agreement. The subcontract agreement in terms of  
 (5) the package that was given to me to look at goes to the very  
 (6) hear of it. I mean, the asset agreement, the service  
 (7) agreement, the subcontract agreement, I wouldn't want to put  
 (8) them in a hierarchy of one, two, three.  
 (9) MR. SPITZER: Well, Your Honor, I can tell you  
 (10) that my recollection in terms of preparation of the  
 (11) materials for Justice and the FTC, there was never any  
 (12) thought given as to whether or not the subcontract agreement  
 (13) was ready to be included in that package because it just was  
 (14) never viewed as an issue that was necessary for that  
 (15) presentation.  
 (16) JUDGE SIPPEL: Well, as I say, I acknowledge that  
 (17) in terms of the initial cast with Justice or FTC on whether  
 (18) or not you made the threshold. I'm not - I wouldn't write  
 (19) it off that quickly with respect to a second request. But  
 (20) that's really not what we're here about. All right. I - I  
 (21) - we've taken a considerable amount of time on this. Is  
 (22) there anything else that the Bureau wanted to say before  
 (23) we -  
 (24) MR. WEBBER: No, Your Honor. I believe our final  
 (25) pleading on the matter speaks to the Bureau's position and

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- (1) that while the Bureau does have questions regarding control,  
 (2) we don't believe they necessarily rise to the level of  
 (3) substantial material and administratively it may be most  
 (4) effective for us to do our own investigation.  
 (5) JUDGE SIPPEL: All right.  
 (6) MR. PETTIT: Your Honor, may I raise one thing?  
 (7) You asked a series of questions regarding billing practices.  
 (8) insurance - transfer of insurance. Would you like  
 (9) something further on either or those?  
 (10) JUDGE SIPPEL: If I do, I'll let you know. I'll  
 (11) have this transcript. This is going to be - when do we get  
 (12) this transcript? In ten days or thereabouts? The Reporter  
 (13) is telling me yes. Is anybody going to order an expedite on  
 (14) this by any chance? Were you thinking of doing that?  
 (15) MR. BECKNER: I get the feeling from your question  
 (16) that you might like to have it sooner and I'll be glad to  
 (17) help you out.  
 (18) JUDGE SIPPEL: Well, if you don't have any - yes,  
 (19) if you wouldn't mind. I don't want to put the burden on  
 (20) anybody. But what I'd like to do is - because what I'd  
 (21) like to do is I'd like to have the question of the  
 (22) confidentiality, I don't want to say briefed, but I'd like  
 (23) to have it addressed. And I would put that on the basis of  
 (24) a - of a motion to be filed five business days after  
 (25) delivery of the - of the transcript which - which Time

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- (1) Warner is going to order on an expedited basis. So that  
 (2) means you would get copies circulated to all the parties.  
 (3) Is that permissible?  
 (4) MR. BECKNER: I guess.  
 (5) JUDGE SIPPEL: Well, I don't want to - well,  
 (6) that's what I want to see done. I want you to get it as  
 (7) fast as you can, get copies for everybody and five days  
 (8) after - after Freedom and Liberty actually receive the  
 (9) transcript, five business days, file a motion with me asking  
 (10) for if you feel that you need it - maybe you won't, I don't  
 (11) need it - if you feel that this needs to be treated as a  
 (12) confidential document, that is the transcript.  
 (13) MS. KIDDOO: In the meantime, it will be treated  
 (14) as -  
 (15) JUDGE SIPPEL: Oh, yes. Absolutely. Until I  
 (16) issue an order, it's going to be treated confidentially.  
 (17) Now, is there anybody that wants to respond to that? Do you  
 (18) want time to respond to that, Mr. Beckner? Or what are your  
 (19) feelings on this? Maybe you feel the same way they do. I  
 (20) don't know.  
 (21) MR. BECKNER: Yes. No, I would like to respond to  
 (22) it, Your Honor, and will respond promptly. We have -  
 (23) JUDGE SIPPEL: Three business days.  
 (24) MR. BECKNER: Three business days, that will be  
 (25) fine.

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- (1) JUDGE SIPPEL: Three business days after they file  
 (2) - after Liberty files theirs.  
 (3) MR. BECKNER: We're certainly not going to tell  
 (4) you how to write your opinion and what you can put in and  
 (5) what you can't put in. I mean, there are documents and I'd  
 (6) just assume - this is the public's business and I really  
 (7) see that this ought to be a public matter.  
 (8) JUDGE SIPPEL: Well, I - anyway. What about the  
 (9) Bureau?  
 (10) MR. WEBBER: Well, it's unlikely the Bureau will  
 (11) feel the need to respond to that request unless we believe  
 (12) that request is excessive in any way. I mean, the Bureau  
 (13) certainly is going to maintain that this is an open  
 (14) proceeding and material should be publicly available. And  
 (15) if we believe they cross that line in trying to keep things  
 (16) that should be in the public away from the public, we will  
 (17) comment. But unless we believe they're excessive, I don't  
 (18) see the need for us to respond -  
 (19) JUDGE SIPPEL: Okay.  
 (20) MR. WEBBER: - unless you specifically request  
 (21) it.  
 (22) JUDGE SIPPEL: No, I will just - you've got the  
 (23) same amount of time. If you feel like you want to, you can  
 (24) respond. But it closes after the end of the third business  
 (25) day and then I'll address it as quickly as I can. I want to

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- (1) say that I mean I have - I have great respect and I can see  
 (2) the need for confidential treatment of information which is  
 (3) truly confidential in nature, that has, you know, a  
 (4) commercial sensitivity to it. But as I have said up front,  
 (5) this has now taken on in the context of kind of historical  
 (6) information that really doesn't - you know, it's not trade  
 (7) secrets or things of that nature. But you know, I will  
 (8) await to be convinced otherwise. I'll be open-minded on it.  
 (9) And you're right, everything is treated confidentially until  
 (10) I issue an order otherwise. That's it then for today. It's  
 (11) - I think - for me anyway it's been a productive couple of  
 (12) hours and I appreciate all your attention. We're in recess  
 (13) until the next hearing. Thank you.  
 (14) (Whereupon, at 12:20 p.m. on Thursday, June 13,  
 (15) 1996, the hearing adjourned.)  
 (16) //  
 (17) //  
 (18) //  
 (19) //  
 (20) //  
 (21) //  
 (22) //  
 (23) //  
 (24) //  
 (25) //

Look-See Concordance  
Report

---  
 UNIQUE WORDS: 1,845  
 TOTAL OCCURRENCES: 7,310  
 NOISE WORDS: 385  
 TOTAL WORDS IN FILE:  
 22,429

---  
SINGLE FILE CONCORDANCE---  
CASE SENSITIVE

---  
 NOISE WORD LIST(S):  
 NOISE.NOI

---  
INCLUDES ALL TEXT  
OCCURRENCES---  
IGNORES PURE NUMBERS---  
WORD RANGES @ BOTTOM  
OF PAGE

---  
 MAXIMUM TRACKED  
 OCCURRENCE THRESHOLD:  
 25

---  
 NUMBER OF WORDS  
 SURPASSING OCCURRENCE  
 THRESHOLD: 36

---  
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